90-1460

Supreme Court, U.S.
FILED
FEB 11 1991
OFFICE OF THE CLERK

No. 90-___

IN THE
SUPREME COURT
OF THE
UNITED STATES

OCTOBER TERM, 1990

TITKI D. TARASSOUM,
Petitioner,

vs.

IMMIGRATION AND
NATURALIZATION SERVICE,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

STEPHEN P. PEPE
(Counsel of Record)
DEBRA L. BOYD
JOHN J. MANIER
O'MELVENY & MYERS
400 South Hope Street
Los Angeles, California 90071-2899
(213) 669-6000

Attorneys for Petitioner
Titki D. Tarassoum

QUESTIONS PRESENTED

I. Whether deportation and asylum proceedings are invalid, where an alien's waiver of his statutory and constitutional right to counsel is not voluntary, knowing or intelligent because the alien was not notified of the availability of free legal services, as required by the Constitution and by statutes and regulations which govern the Immigration and Naturalization Service?

II. Whether an order denying an alien's asylum application is invalid, where (1) the Board of Immigration Appeals failed to consider whether the alien had a subjective fear of persecution in his home country, and (2) neither the Immigration Judge nor the Board of Immigration Appeals applied the proper evidentiary standard which acknowledges that an alien may have a well-founded fear of persecution when the objective likelihood of persecution is not significant?

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

TABLE OF AUTHORITIES iv

OPINIONS BELOW 1

JURISDICTION 2

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED 3

STATEMENT OF THE CASE 8

REASONS FOR GRANTING THE WRIT 15

I. The Tenth Circuit Failed To Find That Mr. Tarassoum's Waiver Of His Statutory And Constitutional Right To Counsel Was Knowing, Voluntary And Intelligent, As Required By Decisions Of This Court 15

II. This Case Raises An Important Issue Of Immigration Law On Which The Courts Of Appeals Are In Conflict And Which This Court Should Resolve: To What Extent, If Any, Must An Alien Show Prejudice When The Alien's Waiver Of His Statutory And Constitutional Right To Counsel Is Invalid. 19

III. The Tenth Circuit Decision Denying Mr. Tarassoum's Asylum Application Conflicts With This Court's Holding In *INS* v. *Cardoza-Fonseca* 23

CONCLUSION 27

APPENDIX A A-1

APPENDIX B B-1

APPENDIX C C-1

APPENDIX D D-1

APPENDIX E E-1

APPENDIX F F-1

TABLE OF AUTHORITIES

Cases Page

Arteaga v. *INS*, 836 F.2d 1227 (9th Cir. 1988) 24

Burquez v. *INS*, 513 F.2d 751 (10th Cir. 1975) 22

Castaneda-Delgado v. *INS*, 525 F.2d 1295 (7th Cir. 1975) 20

Castro-O'Ryan v. *INS*, 847 F.2d 1307 (9th Cir. 1988) 16, 19, 22, 26

Colindres-Aguilar v. *INS*, 819 F.2d 259 (9th Cir. 1987) 21

Escobar Ruiz v. *INS*, 787 F.2d 1294 (9th Cir. 1986), *aff'd en banc*, 838 F.2d 1020 (9th Cir. 1988) 17

Guevara-Flores v. *INS*, 786 F.2d 1242 (5th Cir. 1986), *cert. denied*, 480 U.S. 930 (1987) 25--26

In re Gault, 387 U.S. 1 (1967) 15

INS v. *Cardoza-Fonseca*, 480 U.S. 421 (1987) 13, 24--26

Johnson v. *Zerbst*, 304 U.S. 458 (1938) 15

Kashani v. *INS*, 547 F.2d 376
(7th Cir. 1977) 13, 25

Michelson v. *INS*, 897 F.2d 465
(10th Cir. 1990) 15

Molaire v. *Smith*, 743 F. Supp. 839
(S.D. Fla. 1990) 17

Partible v. *INS*, 600 F.2d 1094
(5th Cir. 1979) 18, 20

Rejaie v. *INS*, 691 F.2d 139
(3d Cir. 1982) 13, 25

Reyes-Palacios v. *INS*, 836 F.2d 1154
(9th Cir. 1988) 16, 19

Rios-Berrios v. *INS*, 776 F.2d 859
(9th Cir. 1985) 18, 20

Rodriguez v. *INS*, 841 F.2d 865
(9th Cir. 1987) 24

SEC v. *Chenery Corp.*, 318 U.S. 80
(1943) 24

United States ex rel. Accardi v.
Shaughnessy, 347 U.S. 260
(1954) 16, 20

United States v. *Holland*, 876 F.2d 1533
(11th Cir. 1989) 20

Statutes

8 U.S.C. § 1105a(a) 2

8 U.S.C. § 1252(b)(2) 15

8 U.S.C. § 1362 . . . . . 15, 17

28 U.S.C. § 1254(1) 2

Regulations

8 C.F.R. § 236.2(a) 17

8 C.F.R. § 242.16(a) 16

Secondary Source

E. Hull, WITHOUT JUSTICE FOR ALL (1985) 16

No. 90-___

IN THE
SUPREME COURT
OF THE
UNITED STATES

OCTOBER TERM, 1990

TITKI D. TARASSOUM,
Petitioner,

vs.

IMMIGRATION AND
NATURALIZATION SERVICE,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Petitioner Titki D. Tarassoum prays that a writ of certiorari issue to review the opinion and judgment of the Court of Appeals for the Tenth Circuit, rendered in these proceedings on November 20, 1990.

OPINIONS BELOW

The Oral Decision of the Immigration Judge, dated July 3, 1986, is unreported and is reproduced as Appendix A hereto. Excerpts of the Transcript of Hearing before the Immigration Judge is reproduced as

Appendix B hereto. The Order of the Board of Immigration Appeals, dated January 27, 1989, is unreported and is reproduced as Appendix C hereto. The Order and Judgment of the United States Court of Appeals for the Tenth Circuit, dated November 20, 1990, is unreported and is reproduced as Appendix D hereto. The Order of the Tenth Circuit denying Mr. Tarassoum's Petition for Rehearing and Suggestion for Rehearing *En Banc,* dated January 11, 1991, is unreported and is reproduced as Appendix E hereto. The Declaration of Titki D. Tarassoum in support of his Petition for Rehearing and Suggestion for Rehearing *En Banc* is reproduced as Appendix F hereto.

JURISDICTION

Jurisdiction below was invoked pursuant to Section 106(a) of the Immigration and Nationality Act, 8 U.S.C. § 1105a(a), which confers upon the court of appeals jurisdiction to review a decision of the Board of Immigration Appeals. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) for review by writ of certiorari.

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED

United States Constitution, Amendment V:

"No person shall . . . be deprived of life, liberty, or property, without due process of law . . . ."

United States Code, Title 8:

"§ 1105a. Judicial review of orders of deportation and exclusion

(a) Exclusiveness of procedure

The procedure prescribed by, and all the provisions of chapter 158 of Title 28 shall apply to, and shall be the sole and exclusive procedure for, the judicial review of all final orders of deportation heretofore or hereafter made against aliens within the United States pursuant to administrative proceedings under section 1252(b) of this title or comparable provisions of any prior Act . . . ."

"§ 1252. Apprehension and deportation of aliens

(b) Proceedings to determine deportability; removal expenses

. . . Proceedings before a special inquiry officer acting under the provisions of this section shall be in

accordance with such regulations, not inconsistent with this chapter, as the Attorney General shall prescribe. Such regulations shall include requirements that---

> (1) the alien shall be given notice, reasonable under all the circumstances, of the nature of the charges against him and of the time and place at which the proceedings will be held;
>
> (2) the alien shall have the privilege of being represented (at no expense to the government) by such counsel, authorized to practice in such proceedings, as he shall choose;
>
> (3) the alien shall have a reasonable opportunity to examine the evidence against him, to present evidence in his own behalf, and to cross-examine witnesses presented by the Government; and
>
> (4) no decision of deportability shall be valid unless it is based upon reasonable, substantial, and probative evidence. . . ."

"§ 1362. Right to counsel

In any exclusion or deportation proceedings before a special inquiry officer and in any appeal proceedings before the Attorney General from any such exclusion or deportation proceedings, the person concerned shall have

the privilege of being represented (at no expense to the Government) by such counsel, authorized to practice in such proceedings, as he shall choose."

United States Code, Title 28:

> **"§ 1254. Courts of appeals; certiorari; certified questions**
>
> Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:
>
> (1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree; . . . ."

Code of Federal Regulations, Title 8:

> **"§ 242.16 Hearing.**
>
> (a) *Opening.* The Immigration Judge shall advise the respondent of his right to representation, at no expense to the Government, by counsel of his own choice authorized to practice in the proceedings and require him to state then and there whether he desires representation; advise the respondent of the availability of free legal services programs qualified under Part 292a of this chapter and organizations recognized pursuant to § 292.2 of this chapter, located in the district where the

deportation hearing is being held; ascertain that the respondent has received a list of such programs . . . ."

"§ 292.2 Organizations qualified for recognition; requests for recognition; withdrawal of recognition; accreditation of representatives; roster.

(a) *Qualifications of organizations.* A non-profit religious, charitable, social service, or similar organization established in the United States and recognized as such by the Board may designate a representative or representatives to practice before the Service and the Board. Such organization must establish to the satisfaction of the Board that:

(1) It makes only nominal charges and assesses no excessive membership dues for persons given assistance; and

(2) It has at its disposal adequate knowledge, information and experience. . . .

(c) *Withdrawal of recognition.* The Board may withdraw the recognition of any organization which has failed to maintain the qualifications required by § 292.2(a). . . ."

"§ 292a.1 Listing.

District directors and officers-in-charge shall maintain a current list of organizations qualified under this part and organizations recognized under § 292.2 of this chapter which have applied for listing under § 292a.3 of this part, located within their respective jurisdictions, for the purpose of providing aliens in deportation or exclusion proceedings with a list of such organizations as prescribed in this chapter."

"§ 292a.2 Qualifications.

Except for an organization which is recognized under § 292.2 of this chapter and is available to render legal services in deportation or exclusion proceedings, an organization which seeks to have its name appear on the Service lists must show that it is established in the United States, provides free legal services to indigent aliens, has on its staff attorneys as defined in § 1.1(f) of this chapter or retains, at no expense to the alien, attorneys as defined in § 1.1(f) of this chapter, who are available to render such free legal services by representation in deportation or exclusion proceedings. Bar associations which provide a referral service of attorneys who render pro bono assistance to aliens in deportation or exclusion proceedings may also qualify to have their names appear on the Service list. Listing of an organization qualified under this part is not equivalent to recognition under § 292.2 of this chapter."

"**§ 292a.5 Removal of an organization from list.**

If the district director or officer-in-charge is satisfied that an organization listed under § 292a.1 does not meet the qualifications as set out in § 292a.2, he/she shall notify the organization concerned, in writing, of his/her intention to remove its name from the Service list. . . . If, after considering the answer by the organization, in the event an answer is submitted, the district director or officer-in-charge determines that the organization does not qualify under § 292a.2, he/she shall remove its name from the list. Removal must be based upon the failure of the organization to meet the qualifications specified in § 292a.2 of this chapter."

STATEMENT OF THE CASE

Petitioner Titki D. Tarassoum, a citizen of Chad, was not represented by counsel in these proceedings until December 7, 1990, when the substitution of counsel was completed. By that time the United States Court of Appeals for the Tenth Circuit had already entered an Order and Judgment affirming the order of the Board of Immigration Appeals (the "BIA") dismissing Mr. Tarassoum's appeal from an oral decision of the Immigration Judge (the "IJ") finding Mr. Tarassoum deportable and denying his application for asylum and withholding of deportation. Although counsel assisted Mr. Tarassoum in the preparation of his Petition for Rehearing and Suggestion for Rehearing *En Banc* before

the Tenth Circuit, this Petition was summarily denied without explanation on January 11, 1991. Accordingly, the causes and ramifications of the deprivation of counsel were never discussed in any of the opinions below.

Mr. Tarassoum entered the United States as a nonimmigrant exchange visitor on a J-1 visa pursuant to 8 U.S.C. § 1101(a)(15)(j), and has resided continuously in this country since March 1978. App. A-1. The Immigration and Naturalization Service (the "INS") subjected Mr. Tarassoum to deportation proceedings which commenced on December 2, 1983, and were ultimately continued to July 3, 1986, to enable Mr. Tarassoum to apply for asylum and withholding of deportation. App. D-3. On the first day of the proceedings, the following colloquy ensued between Mr. Tarassoum and the IJ:

> "[IJ]: Now, the purpose of the hearing is to find out if you are subject to being deported as it is alleged and charged in the Order to Show Cause or not. If you are found to be deportable we continue with the hearing to find out if there is relief available to you so you don't have to be deported from the United States. Do you understand why we are having the hearing as I have explained it?
>
> [MR. TARASSOUM]: Yes.
>
> [IJ]: Now, you got your copy of the Order to Show Cause. I see it in your file before you.

We have got it in the hearing as Exhibit 1. Did you also get a legal aid list and a notice that you have a right to appeal an adverse decision, these two other papers when you got your Order to Show Cause?

[MR. TARASSOUM]: I did, sir.

[IJ]: Thank you. Now, at this hearing you have a right to be represented by an attorney at law of your own choice at no expense to the government or any other person or organization authorized and qualified to practice before the Immigration Service. Or you can represent yourself. That is you can speak for yourself in this hearing. Do you understand . . . this right of representation as explained?

[MR. TARASSOUM]: I do, sir.

[IJ]: Have you made arrangements to have a lawyer or some other person come down to represent you today?

[MR. TARASSOUM]: I wish to represent myself.

[IJ]: You certainly have that right and I will honor it. . . ." App. B-3.

At no time during the deportation and asylum proceedings did the INS or the IJ inform Mr. Tarassoum of the availability of free legal services. The "legal aid list" which Mr. Tarassoum received from the INS listed the names of only two organizations, both of which refused to represent Mr. Tarassoum (because his case was

too complicated) and referred him to private attorneys whose rates Mr. Tarassoum was unable to afford. App. F-1--F-2, ¶¶ 3--6.[1]

The IJ did not inquire if Mr. Tarassoum understood the significance of the "legal aid list," had tried to obtain counsel, had funds to afford counsel, or wanted additional time to try and obtain counsel. The IJ also did not discuss with Mr. Tarassoum the complexity of the legal questions implicated by Mr. Tarassoum's deportation and asylum proceedings. Based on the legal aid list and the IJ's comments at the hearing, Mr. Tarassoum did not understand that he had the right to pursue free legal representation. Mr. Tarassoum wanted to be represented by counsel but was unable to locate any he could afford. App. F-2, ¶ 7.

The BIA also did not inquire whether Mr. Tarassoum was aware of the availability of free legal services. Nor did the BIA make any inquiry as to whether Mr. Tarassoum's purported waiver of counsel before the IJ was valid. The Tenth Circuit likewise did not consider or address Mr. Tarassoum's lack of counsel

---

[1] Catholic Immigration Services charged approximately $30 per visit, and referred Mr. Tarassoum to a private attorney who charged a retainer of $1,250 and an hourly rate of $125. Colorado Rural Legal Services similarly referred Mr. Tarassoum to a private attorney who charged $25 for an initial visit and a retainer fee of approximately $5,000. App. F-1--F-2, ¶¶ 5--6.

in its Order and Judgment affirming the BIA's ruling.[2] Not surprisingly, Mr. Tarassoum himself did not raise the issue until he finally obtained counsel and filed his Petition for Rehearing before the Tenth Circuit. However, the Tenth Circuit summarily denied this Petition without addressing the merits of Mr. Tarassoum's arguments.

Because he was unaware of the availability of free legal services, Mr. Tarassoum was not assisted by counsel as he endeavored to traverse the complex and difficult area of immigration and asylum law. To support his applications for asylum and withholding of deportation, he presented evidence of persecution directed at persons who, like himself, are or were members of the Sara ethnic group in Chad.[3] However, in his legal papers, Mr. Tarassoum placed primary emphasis on (1) the "general conditions of political upheaval" in Chad, and (2) his subjective fear that he would be persecuted upon returning home. Mr. Tarassoum argued that either of

---

[2] Neither the BIA nor the Tenth Circuit honored Mr. Tarassoum's requests for oral argument, which would have provided these tribunals an opportunity to inquire as to the validity of Mr. Tarassoum's waiver of counsel.

[3] This evidence included an article discussing the murder of Mr. Tarassoum's cousin, who had been on a "black list" because of his membership in the Sara, and an Amnesty International report listing other cousins of Mr. Tarassoum who had been arbitrarily detained or simply disappeared. App. C, at C-12.

these circumstances, taken alone, qualified him for asylum and withholding of deportation. App. C-14--C-15; App. D-9.

The IJ had "no doubt" that Mr. Tarassoum harbored a subjective fear of persecution. App. A-15. However, the IJ held that Mr. Tarassoum's "application for asylum [and] withholding of deportation *both* must be denied," App. A-16 (emphasis added), and cited cases which held that an alien must demonstrate a "clear probability of persecution" to establish eligibility for asylum and withholding of deportation. App. A-14 (citing *Rejaie* v. *INS,* 691 F.2d 139, 143 (3d Cir. 1982); *Kashani* v. *INS,* 547 F.2d 376, 379 (7th Cir. 1977)). The IJ's discussion indicates that he recognized no distinction between the legal standard for adjudging eligibility for asylum and the standard for withholding of deportation.

The BIA cited the case in which this Court, subsequent to the IJ's decision, held that the "well-founded fear of persecution" standard for an asylum claim is less stringent than that for withholding of deportation. App. C-13 (citing *INS* v. *Cardoza-Fonseca,* 480 U.S. 421, 430-31 (1987)). However, the BIA offered no further explanation as to the quantum of proof sufficient to establish a well-founded fear. The BIA also failed to address the IJ's finding that Mr. Tarassoum harbored a subjective fear of persecution, nor did it acknowledge that such a subjective fear is relevant under the *Cardoza-Fonseca* test. Although Mr. Tarassoum presented evi-

dence of persecution directed against persons because of their membership in the Sara, App. C-12, the BIA found that his asylum claim was merely based on "general conditions of political upheaval" in Chad and, therefore, could not stand. App. C-15.

In an unpublished, ten-page Order and Judgment, the Tenth Circuit affirmed the BIA's decision. Mr. Tarassoum argued that the BIA failed to apply correctly the *Cardoza-Fonseca* standard, notwithstanding its citation to that case. The Tenth Circuit dispensed with this argument in one paragraph. It quoted the BIA's statement that the standard for asylum claims is less stringent than that for withholding of deportation. The Tenth Circuit then summarily concluded, without further analysis: "Moreover, the record indicates that the BIA applied the different standards of proof to Tarassoum's case." App. D-8.

Although the Tenth Circuit acknowledged that Mr. Tarassoum's "challenge to the BIA's application of the law to the facts of his case present[ed] a closer question," *id.*, it nevertheless affirmed the BIA. In so doing, the Tenth Circuit stated that it "agree[d] with the BIA that [Mr. Tarassoum's] subjective fear alone is insufficient to meet the statutory standard for asylum." App. D-10. However, as noted above, the BIA did not address Mr. Tarassoum's subjective fear, nor did it even acknowledge that subjective criteria are relevant in determining whether an alien's fear of persecution is well-founded.

Furthermore, the Tenth Circuit stated that "[t]he BIA carefully analyzed the political climate in Chad and found that random persecution of the Sara ethnic group was declining." App. D-9. However, the BIA made no such finding; it simply found that, apparently, violence in Chad *generally* was subsiding. App. C-15. Accordingly, the Tenth Circuit's decision was based on a misapprehension or misperception of the BIA's conclusions.

REASONS FOR GRANTING THE WRIT

I. The Tenth Circuit Failed To Find That Mr. Tarassoum's Waiver Of His Statutory And Constitutional Right To Counsel Was Knowing, Voluntary And Intelligent, As Required By Decisions Of This Court.

A waiver of the right to counsel cannot be given legal effect unless it is an "'intentional relinquishment or abandonment' of a fully known right." *In re Gault,* 387 U.S. 1, 42 (1967) (quoting *Johnson* v. *Zerbst,* 304 U.S. 458, 464 (1938)).

Congress has declared that aliens have a statutory right to be represented by counsel in deportation proceedings. 8 U.S.C. §§ 1252(b)(2), 1362. This right to counsel is further protected by the Fifth Amendment's due process clause. *See, e.g., Michelson* v. *INS,* 897 F.2d 465, 468 (10th Cir. 1990). Courts have emphasized the importance of counsel in deportation proceedings, "particularly in

asylum cases where the law is complex and developing." *Reyes-Palacios* v. *INS*, 836 F.2d 1154, 1155 (9th Cir. 1988); *see Castro-O'Ryan* v. *INS*, 847 F.2d 1307, 1312 (9th Cir. 1988) (describing the immigration laws as "second only to the Internal Revenue Code in complexity") (quoting E. Huli, WITHOUT JUSTICE FOR ALL 107 (1985)).

In the instant case, Mr. Tarassoum waived his right to counsel in the deportation and asylum proceedings before the IJ. However, neither the BIA nor the Tenth Circuit addressed the question of whether Mr. Tarassoum's waiver was knowing, voluntary or intelligent, as the Constitution requires.[4]

The record demonstrates that Mr. Tarassoum's waiver was not constitutionally valid, because he was never made aware of the availability of free legal services. INS regulations require that aliens receive such information. 8 C.F.R. § 242.16(a).[5] This requirement exists to ensure "that any waiver of counsel is made knowingly and intelligently," as the Constitution mandates.

---

[4] Mr. Tarassoum was not represented by counsel until after the Tenth Circuit rendered its Order and Judgment. Accordingly, he could not have been expected to raise any arguments regarding the deprivation of counsel until he was advised to do so by counsel.

[5] A federal agency is powerless to disregard its own regulations which, once promulgated, have "the force and effect of law." *United States ex rel. Accardi* v. *Shaughnessy*, 347 U.S. 260, 265-66 (1954).

See Molaire v. *Smith*, 743 F. Supp. 839, 844 (S.D. Fla. 1990) (construing a substantially identical regulation, 8 C.F.R. § 236.2(a), pertaining to exclusion hearings).[6]

Although the IJ advised Mr. Tarassoum of his right to counsel, the IJ made no attempt to explain the INS mandate that information about *free* legal services should be available to aliens in deportation proceedings.[7] Nor did the IJ make any inquiry of Mr. Tarassoum's efforts to obtain counsel. Had the IJ done so, he would have discovered that Mr. Tarassoum independently investigated

---

[6] In addition, District Directors must maintain and provide to aliens a current list of organizations which have legal staff available to provide free legal services in deportation proceedings or bar associations which refer aliens to attorneys who provide *pro bono* assistance to aliens in such proceedings. 8 C.F.R. §§ 292a.1, 292a.2. Organizations which do not meet these requirements are to be excluded or removed from the list. 8 C.F.R. § 292a.5.

[7] However, the IJ made certain to tell Mr. Tarassoum that his counsel would not be at government expense, as provided in 8 U.S.C. § 1362. Courts have intimated that § 1362 may violate due process in certain cases where indigent aliens are unrepresented in deportation hearings. *See, e.g.*, *Escobar Ruiz* v. *INS*, 787 F.2d 1294, 1297 n.3 (9th Cir. 1986), *aff'd en banc*, 838 F.2d 1020 (9th Cir. 1988); *Molaire*, 743 F. Supp., at 848. Moreover, the Sixth Amendment may require that aliens in deportation proceedings receive legal services at government expense. This Court need not reach these issues, however, in order to decide this case.

the two organizations on the "legal aid list" he received, but found that the services which these organizations offered were neither "free" nor "available." Mr. Tarassoum was totally unaware that free legal services might be available to him, that he could request additional time to seek representation, or that the choice of self-representation was likely to have serious negative consequences in his deportation and asylum case.[8] Under such circumstances, Mr. Tarassoum's uninformed waiver was clearly invalid under *Gault* and *Zerbst*. *See Partible* v. *INS,* 600 F.2d 1094, 1096 (5th Cir. 1979) (waiver of counsel invalid where IJ failed to inform alien of complexity of case); *cf. Rios-Berrios* v. *INS,* 776 F.2d 859, 863 (9th Cir. 1985) (IJ should have continued hearing *sua sponte* to permit alien to locate counsel; mere "lip service" to right of counsel insufficient to satisfy requirements of statute, regulation, and due process).

It is hardly burdensome to require the IJ to inform an alien of the availability of free legal services. Yet this task is essential to ensure that the alien does not unknowingly waive his right to counsel in deportation proceedings. Had the IJ fulfilled his duty, he would have discovered that Mr. Tarassoum wanted counsel but had

---

[8] Indeed, the IJ's juxtaposition of Mr. Tarassoum's right to counsel with the "no expense to the government" language, combined with the IJ's failure to mention the availability of free counsel, likely confused Mr. Tarassoum into erroneously believing that he had *no* right to pursue free legal advice.

not yet located any he could afford. Moreover, the BIA and the Tenth Circuit failed to correct the IJ's error. The record does not support an inference that Mr. Tarassoum knew what he was waiving.

Neither the BIA nor the Tenth Circuit inquired whether Mr. Tarassoum's waiver of counsel before the IJ was valid. Nor did these tribunals determine whether Mr. Tarassoum was aware of the availability of free legal services. Therefore, both the BIA and the Tenth Circuit erred in affirming the IJ's decision reached in a hearing "marred by the denial of counsel." *Castro-O'Ryan,* 847 F. 2d, at 1314. Because the Tenth Circuit's failure to address the validity of Mr. Tarassoum's waiver of counsel is inconsistent with this Court's holdings in *Gault* and *Zerbst,* this Petition should be granted.

II. This Case Raises An Important Issue Of Immigration Law On Which The Courts Of Appeals Are In Conflict And Which This Court Should Resolve: To What Extent, If Any, Must An Alien Show Prejudice When The Alien's Waiver Of His Statutory And Constitutional Right To Counsel Is Invalid.

Some courts have implied that in cases involving the "complex and developing" law of political asylum, interference with the right to counsel is *per se* prejudicial. *See Reyes-Palacios* v. *INS,* 836 F.2d 1154, 1155 (9th Cir.

1988); *see also Castaneda-Delgado* v. *INS,* 525 F.2d 1295, 1300 (7th Cir. 1975) (deprivation of counsel in deportation proceedings prejudices "too important and fundamental a right to be circumscribed by a harmless error rule"). Indeed, this Court has held that the violation of INS regulations may be reversible error in the absence of a specific showing of prejudice. *United States ex rel. Accardi* v. *Shaughnessy,* 347 U.S. 260, 268 (1954). This rationale is even more forceful where the regulation is designed to benefit aliens; the regulations governing the right to counsel surely fall within this category. Mr. Tarassoum's case was complicated enough that two legal aid organizations specializing in immigration services refused to take it; this fact alone demonstrates the inherent prejudice in *pro se* representation in a case such as this.

Other courts have held that prejudice exists where the outcome of the deportation proceeding might have been different but for the lack of counsel. *Rios-Berrios* v. *INS,* 776 F.2d 859, 862--63 (9th Cir. 1985) (asylum case could have been "more advantageously presented" by counsel); *Partible* v. *INS,* 600 F.2d 1094, 1096 (5th Cir. 1979) ("the outcome of the proceeding may have been different if counsel had been present"); *compare United States* v. *Holland,* 876 F.2d 1533, 1537 (11th Cir. 1989) (alien failed to allege how result of deportation proceeding might have been different had he been advised of his rights).

Had Mr. Tarassoum been represented by counsel in the proceedings below, the IJ and BIA might well have ruled in his favor. Indeed, the Tenth Circuit remarked that the asylum claim presented a close question. App. D-8. The IJ found, and the INS has not disputed, that Mr. Tarassoum demonstrated a subjective fear of returning to Chad. According to the IJ and BIA, Mr. Tarassoum merely failed to provide sufficient *objective* evidence to demonstrate a "well-founded fear" of persecution; this may have resulted from Mr. Tarassoum's misplaced emphasis on the general turmoil in Chad rather than on persecution directed specifically at the Sara ethnic group. However, the objective evidence is sufficient to support Mr. Tarassoum's asylum claim. What Mr. Tarassoum lacked was counsel, who could have "better marshalled specific facts" in order to convince the IJ and BIA that Mr. Tarassoum qualifies for asylum relief. *Colindres-Aguilar* v. *INS,* 819 F. 2d 259, 262 (9th Cir. 1987).

And if the evidence as presented was insufficient to establish a "well-founded fear of persecution," Mr. Tarassoum handicapped his chances for success before the IJ and BIA by mistakenly arguing that his subjective fear of persecution fulfilled the standard for granting asylum. *See* App. D-9. Counsel could have distinguished these elements and collected whatever additional objective evidence that might have been necessary to convince the IJ and BIA that Mr.

Tarassoum's subjective fear of persecution was objectively "well-founded."

Moreover, the IJ and BIA applied an incorrect legal standard to Mr. Tarassoum's asylum claim, the denial of which was not supported by substantial evidence. *See* Part III, *infra.* Counsel could have prevented these errors. *See Castro-O'Ryan* v. *INS,* 847 F. 2d 1307, 1313 (9th Cir. 1988) (counsel would "undoubtedly" have alerted IJ to errors in analysis). Thus, Mr. Tarassoum was clearly prejudiced in the proceedings before the IJ and BIA because his waiver of his right to counsel was invalid.

The Tenth Circuit, however, has imposed a more stringent standard for prejudice, holding that a deportation order must be affirmed "where it is *doubtful* that counsel could have obtained a different result in the administrative proceedings." *Burquez* v. *INS,* 513 F.2d 751, 755 (10th Cir. 1975) (emphasis added).[9] Thus, an alien would have to show that it is *probable,* rather than merely

---

[9] Note that the alien in *Burquez* did not argue that the result would have been different had he been represented, but rather challenged the sufficiency of his waiver of counsel and the substantiality of the evidence supporting his deportability. 513 F.2d, at 754-55.

Because the Tenth Circuit dealt summarily with Mr. Tarassoum's Petition for Rehearing, it did not explain whether it rejected his arguments regarding the deprivation of counsel because it was "doubtful" that counsel would have achieved a different result.

possible, that the result would have been different but for the lack of counsel. This onerous standard would essentially require an alien to retry and "prove" his case with counsel, by marshalling evidence, gathering new facts, or advancing new theories for the first time on appeal. The appellate courts should not be in the business of weighing evidence on factual matters, and are understandably reluctant to entertain new arguments not raised at the administrative level.

By contrast, if the deprivation of counsel is deemed *per se* prejudicial, or if the alien need only demonstrate that the result might have been different had counsel been present, the alien would receive what he is due: legal representation in a hearing before the IJ or BIA. The Tenth Circuit stands alone in refusing to adopt either of these standards. Accordingly, this Petition should be granted to resolve the conflict among the Courts of Appeals on this important question of immigration law.

III. The Tenth Circuit Decision Denying Mr. Tarassoum's Asylum Application Conflicts With This Court's Holding In *INS* v. *Cardoza-Fonseca*

Subsequent to the IJ's 1986 decision in this case, the Supreme Court determined that an applicant seeking asylum demonstrates a "well-founded fear of persecution" in his native country under a partly subjective and partly objective standard, and the standard may be met even when there is only "a 10% chance" of the occurrence

taking place. *INS* v. *Cardoza-Fonseca*, 480 U.S. 421, 431 (1987). The standard for demonstrating eligibility for asylum is considerably more lenient than that for withholding of deportation, under which an applicant must demonstrate a "clear probability of persecution," *i.e.*, a strictly objective showing that it is "more likely than not" that the applicant will be persecuted upon deportation. *Id.*, at 430. In the instant case, both the BIA and the IJ failed to apply the correct legal standard.

In adjudging an asylum claim, the IJ and BIA must (1) specifically acknowledge that the standard to be applied in asylum cases is more generous than that applied in withholding of deportation cases, *and* (2) *actually apply* the more generous standard. *Arteaga* v. *INS*, 836 F.2d 1227 (9th Cir. 1988) (BIA order reversed despite citation to *Cardoza-Fonseca* where BIA actually applied stricter objective standard). The failure to apply the correct standard is reversible error; it cannot be dismissed as harmless. *See Rodriguez* v. *INS*, 841 F.2d 865, 870 (9th Cir. 1987) (reversal of BIA order is required where BIA fails to apply the proper legal standard to asylum claim); *see also SEC* v. *Chenery Corp.*, 318 U.S. 80, 94 (1943) (administrative decision cannot stand if tainted by incorrect legal standard).

In the instant case, the BIA failed to acknowledge the IJ's erroneous holding that the "clear probability" and "well-founded fear" standards are one and the same. The IJ cited to two cases which stand for this proposition.

App. A-14 (citing *Rejaie* v. *INS,* 691 F.2d 139, 143 (3d Cir. 1982); *Kashani* v. *INS,* 547 F.2d 376, 379 (7th Cir. 1977)). However, *Rejaie* and *Kashani* are no longer valid case authority in light of the Supreme Court's decision in *Cardoza-Fonseca,* which was issued one year after the IJ's decision. There is no question that the IJ, without the benefit of the *Cardoza-Fonseca* decision, erroneously adjudicated Mr. Tarassoum's asylum claim under the rigid "clear probability of persecution" standard.

Unlike the IJ, the BIA cited *Cardoza-Fonseca* and noted that the burden of proof in an asylum claim is lower than that for withholding of deportation. However, this alone is insufficient. The BIA's order contains two fatal flaws: (1) it did not apply the subjective component of the "well-founded fear" test, and (2) it compounded the error of the IJ, who held that an alien must demonstrate that a "clear probability" of persecution exists to establish asylum eligibility.

The BIA did not even address subjective criteria in adjudging Mr. Tarassoum's asylum claim. This is clear evidence that, notwithstanding its citation to *Cardoza-Fonseca,* the BIA did not apply the partially subjective "well-founded fear" standard for granting asylum but, rather, employed the purely objective "clear probability" test for withholding of deportation. This Court has described the difference between the subjective and objective frames of reference as "striking." *Cardoza-Fonseca,* 480 U.S., at 431 (quoting *Guevara-Flores* v. *INS,*

786 F.2d 1242, 1250 (5th Cir. 1986), *cert. denied,* 480 U.S. 930 (1987)). The BIA's failure to apply subjective criteria in analyzing Mr. Tarassoum's asylum claim is reversible error.[10]

Moreover, the BIA's opinion suggests that it, like the IJ, decided that it was "more likely than not" that Mr. Tarassoum would *not* face persecution in Chad. However, such a finding does not preclude the existence of a "well-founded fear" and, thus, is not dispositive of an asylum claim. *Cardoza-Fonseca,* 480 U.S., at 431. Accordingly, the BIA's order affirming the IJ's decision cannot stand. *See Castro-O'Ryan* v. *INS,* 847 F.2d 1307, 1314 (9th Cir. 1988) (BIA failed to cure unfair proceeding before IJ on which BIA's order rested). Because the Tenth Circuit failed to correct the BIA's misapplication this Court's decision in *Cardoza-Fonseca,* this Petition should be granted.

---

[10] As discussed above, the Tenth Circuit correctly noted that a subjective fear, without more, does not establish a "well-founded fear." The court was incorrect, however, when it intimated that the BIA ruled on this issue; the IJ did, but the BIA never discussed the subjective component of the test.

CONCLUSION

For all of the foregoing reasons, this petition for a writ of certiorari should be granted.

DATED: February 9, 1991.

Respectfully submitted,

STEPHEN P. PEPE
(Counsel of Record)
DEBRA L. BOYD
JOHN J. MANIER
O'MELVENY & MYERS
400 South Hope Street
Los Angeles, California 90071-2899
(213) 669-6000

Attorneys for Petitioner
Titki D. Tarassoum

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
OFFICE OF THE IMMIGRATION JUDGE
Denver, Colorado

File No.: A 24 890 067 July 3, 1986

In the Matter of	)	
	)	IN DEPORTATION
TIFKEY TARASSOUM	)	PROCEEDINGS
	)	
Respondent.	)	

CHARGE: Non-immigrant remained longer.

APPLICATION: Termination; in the alternative asylum under Section 208 of the Immigration and Nationality Act; withholding of deportation Section 243(h) of the Immigration and Nationality Act and alternatively, voluntary departure in lieu of deportation.

ON BEHALF OF RESPONDENT: Pro Se

ON BEHALF OF SERVICE: Arnie Brassart, Esquire

ORAL DECISION OF THE IMMIGRATION JUDGE

The respondent is a thirty-three year old married male alien, a native and citizen of Chad who entered the United States at New York, New York on or about March 16, 1978, at which time he was admitted as a non-

immigrant exchange visitor authorized to remain in the United States until November 4, 1981,

On September 7, 1983, an Order to Show Cause issued against the respondent alleging alienage, the above entry information, and further alleging he was remained in the United States beyond November 4, 1981, without permission of the Immigration and Naturalization Service. The Order charges deportability under Section 241(a)(2) of the Immigration and Nationality Act in that after admission as a non-immigrant under Section 101(a)(15) of said Act, he has remained in the United States for a longer time than permitted.

A deportation hearing commenced October 11, 1983, at which time the Order to Show Cause was entered in the hearing as Exhibit 1, and case was set for hearing.

When the hearing resumed and the respondent admitted allegations one, two and three of the Order to Show Cause, denied allegations four, and five in the Order to Show Cause and denied the charge.

Exhibit 2, form I-94, arrival departure document was entered in the hearing. It shows the admission in the United States as alleged in the Order to Show Cause, classification J-1, until March 29, 1978, as a student destined to Las Cruces, New Mexico showing that he was born in Mario in Chad. He attained the visa at N'Djamena, Chad. The reverse shows extensions of stay

obtained at the El Paso office of Immigration and Naturalization Service Until March 29, 1980. There is a continuation or attachment to the I-94 number I-130-72-16 which contains further extensions obtained at the office of Immigration and Naturalization Service, El Paso, Texas. The last one until November 4, 1981, which is the date alleged in the Order to Show Cause.

Exhibit 3 is a form IAP-66A. Copy one for the Immigration and Naturalization Service relating to the respondent tells us he is a student to attend the Colorado State University, Fort Collins, Colorado and the contractor is U.S.D.A., U.S.A.I.D., covering the period 5/29/82 until 5/28/83 as a student and the program is for P.H.D. in range management that he will be provided by the program sponsor in item 2 approximately $17,792.00 and the sponsor is Aid to United States International Development Corporation and part 2 contains a statement no endorsement or counselor or Immigration Officer regarding Section 212(e) of the Immigration and Nationality Act is necessary because all aid participants are subject to two year residence requirement. Exhibit 4 is on the letterhead of the New Mexico State University and is dated February 24, 1982 to the embassy of Chad in Washington, D.C., supporting the application replacement of expired passport for the respondent. It states that he must have a valid passport at all times. The efficacious of this of course, is the respondent stated that there had been several inquiries to the embassy of Chad to obtain a passport and they apparently have stated they will look

into the matter and has been no follow through as the respondent said he has not received a passport. There is also another letter on the New Mexico State University addressed to the Director National Foreign Affairs in Washington. The authority is requesting assistance to obtain the re-validation of the respondent's passport.

The case was continued to allow the respondent to file his application for asylum, withholding of deportation as he stated that he could not return to Chad due to the strife there, that he fears he would be persecuted. He was given ten days to file this application for asylum, withholding of deportation, if not filed, it would be ruled to be abandoned and a period of voluntary departure time would be granted with an alternate order of deportability, first to Ivory Coast the county of his choice if Ivory Coast refuse to accept him or within three months of original inquiry failed to advise the Attorney General whether it would or would not accept him into its territory, the Court ordered deportation to Chad. This triggered consideration for relief under Section 243(h) of the Act. At that time he said his basis for asylum, withholding of deportation was because he was from the Southern part of Chad the region of the Sara Tribe and that the present government was persecuting the members of this tribe and as a member of this tribe and because of the persecution he would have a well-founded fear of persecution. Also, developed during the application that his father was a Judge in one of the geographical units in Chad and was a member of one of the governments that

had been overthrown and because of this, his father's prominent position, he would be considered to be of the educated or part of the intellectual members of this Sara tribe would be further singled out for persecution.

Exhibit 6 is his application for asylum, withholding of deportation which had been filed previously. Reviewing it, it shows that he is ethnically a member of the Sara tribe. He was born in Mario, Cad, December 2, 1952. His religion is Christianity. He speaks English, French and San the dialect. It gives his residences, his schooling. He is primarily to the high school in Chad and then he came to the university. He obtained a Master's from the New Mexico State University. He is working on his doctrine now at the Colorado State University. He has researched teaching some typing, some agriculture plants, etc. He is married to a United States citizen. There are no children of this union. Item 23 is answered he has no relatives in the United States other than immediate family. He has cousins who are refugees outside the United States. One is in the Congo the others are in Paris, France. His passport is not valid. He says it has expired in 1981 he has been unable to obtain a revalidation. He does of course have his national identity card. He came to the United States to attend school. Was last in Chad in March of 1978. Now, item 31 which asks what he thinks would happen to him if he returned to Chad, he says he would be persecuted because of his ethnic affiliation, political views, and his refusal to interrupt his studies and return home on the request of the present govern-

ment. He says he would not return to Chad because of the current situation, as a result of personal conflicts between the warlords eager for power. He would suffer the consequences of an ill-justified war. There has been merciless killing of Southern civilians by the government. He has never belonged to any organizations nor has any member of his family. He says he has taken actions which he believes would result in persecution on return to Chad because of his refusal to return home when requested by the government of Chad and he says he has heard of individuals who were forced to return and they were arrested on arrival and have not been heard from again. The only detention arrest he has had is by Immigration Service in Denver because of his immigration status and he was released on a minimum bond. In item 37 he states that his claim for asylum on current conditions in Chad affect his freedom more than the rest of that country's population since his absence from Chad prior to the political breakdown in '79 and overstaying his leave and the current population in Chad has remained there and has learned or accepted to live with it or at least have become used to it. Item 38 is answered in the affirmative that he or members of his family have been mistreated by the authorities of Chad. He says he has not heard from his family since early 1984. They live in the Southern part of the country where there has been much fighting. He did not apply for asylum in any other country and has not been recognized as a refugee by any other country or by the United Nations Commissioner for refugees but has sent a copy of his 589 and documents to

the United Nations Commissioner for refugees in December. They know he is registered because he had had his file since '76 and he has requested a renewal of his passport since '81. He says under item 44 other information is supplied that he states there are actually two wars been fought in Chad. One of the opposing Moslem groups in the North and the non-Moslem Southerns. And then he says the other wars are the wars against two opposing Northern Moslem groups that are fighting each other. That is the present ruler Habler versus Gocunni is vying for power. There are reports that President Habler's forces are retaining, torturing, killing thousands of prominent civilians in the Southern part of the country as he is originally from the South he thinks he would fall within that group. The addendum adds very little information that was not on the original application. Item 15 says he has remained neutral. Item 16 states in essence that he is from the Sara ethnic group. It does not support the Habler government nor the Gocunni faction because the alleged change from the territory in Northern Chad to Lybia allowing Lybia to exercise control of their political support. On correction on the members of his family, he says he has his mother, sister and two half brothers. He doesn't know where they are. He says the present location unknown. He had written his mother, had his letter returned which is part of supporting documentation again re-stating that they are from the South. There is a letter from the respondent to the Immigration Service reiterating much of the information in his application and giving some details of background

of the two wars that are taking place in Chad this is dated December 12, 1983.

Exhibit 6 is the opinion and transmittal letters regarding the opinion from the State Department dated May 4, 1984. It is showing it was sent to the respondent dated May 27, 1986. The opinion says in review of the information submitted the respondent has failed to establish a well-founded fear of being persecuted in Chad within the meaning of the United Nations protocol relating to the status of refugees.

The hearing was continued as the respondent had submitted some letters in French and they had to have them translate and other documentation for the hearing to resume.

The hearing resumed today July 3, 1986, at which time Exhibit 7 was received in the hearing. Exhibit 7 is a new form I-589 with addendums giving fairly lengthy explanations and index of supporting documentation and several articles from New Africa covering the period of 1983 through 1986. Some material also from Amnesty International. Included in this are the articles that were written in French, the respondent has resubmitted as they are now in English. They are the "Horrow Scenes in Mario" the region where the respondent is from; from Africa and Asia periodical dated December 1984 and published in Paris. The tenure of the material is the civil strife that exists in Chad. Now the presence of arbitrary

forces apparently taking reprisals against the civilians in armed oppositions in the South. It speaks of people leaving the area, seeking refuge in Central African Republic. The other letters from Congo dated February 25, 1985 in which the principle important to this case is other than the personal references is no question of returning to Chad at the moment because of what is happening in the South and he states that people have fled Mario to seek refuge in Northern Central African Republic near the area of Cabo, that some of the cadre who enlist over there have been apparently executed, indicating a first peace conference in Braziville failed because President Habler wanted to be recognized as a legitimate head of state and the other factions rejected. He is trying to say that he will pursue his education as finding a job in Congo is impossible and he says he is hesitant to write frequently to N'Djamena for fear of creating problems for those who are still living there. And another letter essentially the same information and the same concerns and there is a letter addressed, he stated he identified as one that was returned, to his mother there and there is a telegram and he says it was sent attesting the atrocities of the civil war; another that was sent to the Ambassador in care of the ministry superior education; higher education signed by the respondent as vice-president of the Association of Students here in the United States and it gives the students at New Mexico State University in Las Cruces, University of Arizona in Tucson one is Tuskegee Institute in Alabama the other University of Florida in Gainesville.

One of the letters is translated from French. There is another document dated September 30, 1983 on the Larimer County Mental Health Center. The respondent's wife's problems suffering from anxiety and depression and gives the medication that if such is not available it advises that she not go.

Now, based upon the admissions the respondent has made to allegations one, two and three alienage and admission in the United States as alleged in the Order to Show Cause is established. Exhibit 2, the I-94, shows that the respondent has applied for and received extensions of stay the last expiring November 4, 1981. There is no evidence that the respondent has received permission from the Immigration and Naturalization Service to remain in the United States beyond November 4, 1981. Respondent has testified that he did marry and wanted to get his permanent residency. His wife has filed form I-130 in his behalf but he has been unable to obtain a waiver of the foreign residence requirements as required by the Immigration and Nationality Act as he was admitted in the United States as an exchange visitor. The last denial of a 212(e) waiver, two had been denied the last one was denied he thinks in 1985 the exact date unknown. In this connection it is noted the respondent has seven years continuous physical presence. However, as he was admitted in the United States as an exchange visitor he is barred statutorily ineligible for such relief due to the necessity to satisfy the foreign residency requirement by the provisions of Section 244(b).

As the respondent has not produced evidence to show he has been authorized to remain in the United States beyond the date alleged and shown on Exhibit 2, that is November 4, 1981, I find that deportability has been established by evidence which is clear, convincing and unequivocal which is the burden placed upon the Service. See 885 US 276 (1966); 8 CFR 242.14(a). See Matter of Taberen 15 I&N Dec. 689 (BIA 1976). In Taberen the Board on page 690 stated "a non-immigrant alien has the obligation either to depart at the expiration of his authorized period of stay, or to obtain a proper extension of that stay. Counsel, in essence, argues that the respondent's overstay was justified under the circumstances. As a general rule, however, an inquiry into whether or not an overstay was justified is not germane to the question of an alien's deportability under Section 241(a)(2). Citations and cases are admitted.

In order to establish an alien's deportability as an "overstay", the Service need only show that the alien was admitted as a non-immigrant "--- for a temporary period, that the period has elapsed, and the non-immigrant has not departed." Milande v. INS, 484 F.2d 774, 776 (CA 7, 1973). The Service has made such a showing in this case.

Respondent has applied for relief under Section 208 of the Immigration and Nationality Act for asylum and for relief under the provisions of Section 243(h)(1) of the Immigration and Nationality Act -- withholding of

deportation. Now, Section 208 of the Immigration and Nationality Act mandates the Attorney General to establish a procedure whereby an alien can apply for asylum within the United States. Requisite for such relief is that the alien establishes that he is a refugee as defined in Section 101(a)(42)(A) of the Immigration and Nationality Act (8 U.S.C. 1101(a)(42)(A) states in pertinent part the term "refugee" (a) means any person who is outside of any country of such person's nationality --- who is unable or unwilling to return to --- that country because of persecution or well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group or political opinion. Said Section 101(a)(42)(A) states in essence that to receive asylum an alien must establish that he would be persecuted or have a well-founded fear of persecution if returned to his country, that is why he can ask for relief from that country because of his race, religion, nationality, belonging to a particular social group or because of political opinion. Now, Section 243(h)(1) of the Immigration and Nationality Act prohibits the Attorney General from returning an alien to a country if the alien establishes that his life or freedom would be threatened because of one of the five factors mentioned in the definition for refugee, that is race, religion, nationality, belonging to a particular social group or because of political opinion.

As stated above, the respondent's claim principally lies upon the unrest and civil strife that exists in Chad at

the present time. He states that he has been in the United States since the stable government of Chad crumbled and there has been civil strife in Chad since. He testified that reports and his evidence of the new Africa material submitted establishes that there are assassinations and reprisals apparently by killings of a lot of the people that live in the Sara area, the Southern part of Chad of which the respondent is by birth and tribal affiliations considered a member by troops of the government of President Habler. Further he states as he is an educated individual working on his doctrine he would further be persecuted as a member of this group of intellectuals coupled with his belonging to the Sara Tribe would result in persecution. Also, he stated because of the fact that he is his father's son and assisted his father during summer vacations when the respondent was from school, he would be persecuted. In this connection he stated that his father was a judge in one of the geographical areas there in Southern Chad an area near his birth and because of this association and being an intellectual he would be persecuted and also because of being a member of the Sara Tribe.

Now, for 243(h) relief the respondent must establish that there is a clear probability that he would be persecuted if returned to Chad. This burden of proof is placed upon the respondent by a recent Supreme Court decision INS v. Stevic, 467 U.S. (1984). The case has further held that an undocumented assertion or an apprehension which is purely subjective is not sufficient

to support a persecution claim under Section 208 or 243(h) of the Act. An applicant must present objective evidence that he has a well-founded fear that he is likely to be singled out for persecution by government officials in the country of deportation. In this connection see McMullen v. INS, 658 F.2d 1312 (9th Cir. 1981) which is Matter of McMullen, 17 I&N Dec. 542 (BIA 1980) which was reversed on other grounds, also see Kashani v. INS, 547 F.2d 376 (7th Cir. 1977), also Rejaie v. INS, 691 F.2d 139 and 145 (3rd Cir. 1982). As stated in Dally v. INS, _____, (6th Cir. 1985), the applications must be submitted by credible objective evidence to support the subjective claim of persecution. (Chavez v. INS, 723 F.2d 1431 (9th Cir. 1984). As far as the respondent's claim that he would be persecuted, but he has the burden to establish that he would be individually singled out and subjected to persecution in this connection see Fleurinor v. INS, 585 F.2d 129, page 133 (5th Cir. 1978) and Matter Surzycki, 13 I&N Dec. 261 (BIA 1968).

As stated in a recent Board decision in Matter of Acosta, _____ 2986 (BIA 1985) there is a two prong test to be applied in such cases. One, 15 the factual basis upon which respondent bases his claim credible that is, has he established by credible evidence that the facts which are the basis of his claim for asylum or withholding of deportation true? Second, do the facts which are put forth as a basis for a claim of asylum, if found to be true, do they meet the test of eligibility for

asylum or withholding of deportation as set forth in the Act. In other words, do these facts, if established, meet the statutory eligibility requirements for the relief sought.

As to the respondent's claim of fear for returning to Chad, I have no doubt that the respondent has a subjective fear of to Chad. His testimony and the supporting documentations establish the civil strife that exists in Chad and I find that the factual basis upon which the respondent's claim for asylum is based and the respondent's testimony establish that he has a subjective fear of returning to Chad. However, in this connection the respondent has candidly admitted that he has been here in the United States other than the telegrams or the protests that he has sent to protest the civil strife in Chad earlier while he was attending the University in New Mexico. He is not political and it is basically because of his subjective fear that he does not desire to return. However, as the Court reviews this, the cases as decided, I do not find that the facts upon which the respondent basis his claim meet the statutory requirement of eligibility for asylum or withholding of deportation. See INS v. Stevic, supra; Matter of Acosta, supra; Matter of McMullen, supra and Fleurinoir v. INS, supra. There is no evidence that this respondent would be singled out for persecution. Therefore, his relief under Section 243(h) of the Immigration and Nationality Act must fail. There is no showing, no evidence of record that respondent has been physically persecuted. In fact, he has been in the United States since the civil strife came into play in Chad.

As the factual basis has been found not to meet the statutory eligibility requirement, I find that his application for asylum, withholding of deportation both must be denied for the reasons set forth above.

Respondent has applied for voluntary departure in lieu of deportation. It appears to be no reason why he should not obtain it, although the evidence obtained in this area is somewhat sketchy, same will be granted.

Respondent has chose to be sent to Ivory Coast if ordered deported from the United States. The Court has directed deportation to Chad in the event that Ivory Coast refuses to accept respondent into its territory or within three months of original inquiry fails to advise the Attorney General whether it will or will not accept the respondent into its territory. This, of course, triggers relief under Section 243(h)(1) of the Act which has been denied as set forth above as the respondent has failed to establish claim for relief for which he seeks.

ORDER

IT IS ORDERED that in lieu of an order of deportation respondent shall be granted voluntary departure without expense to the government on or before October 3, 1986 or any extension granted by the District Director of the Immigration and Naturalization Service and under conditions as he shall set.

IT IS FURTHER ORDERED if the respondent fails to depart when and as required the privilege of voluntary departure is withdrawn without further notice or proceeding and the following order becomes immediately effective: respondent shall be deported from the United States to the Ivory Coast on the charge in the Order to Show Cause.

IT IS FURTHER ORDERED if the aforementioned country refuses to accept the respondent into its territory or within three months of original inquiry fails to advise the Attorney General whether it will or will not accept the respondent into its territory respondent shall be deported from the United States to Chad on the charge in the Order to Show Cause.

JESSE SELLERS
Immigration Judge

United States Department of Justice
Executive Office for Immigration Review
Office of the Immigration Judge

Matter of		File: A 24 890 067
TIFKEY TARASSOUM	)	In DEPORTATION Proceedings
Respondent.	)	Transcript of Hearing

Before _____, Immigration Judge

Date: December 2, 1983

Place: DENVER, COLORADO

Transcribed by C&W ASSOCIATES, INC.
At NEWPORT NEWS, VA

Official Interpreter _____

Language ENGLISH

Appearances:

For the Immigration and Naturalization Service: MR. BRASSART

For the Respondent: PRO SE

JUDGE FOR THE RECORD

This is a continuation of the hearing in deportation proceedings in the matter of Tifkey (phonetic spelling) Tarassoum, file A 24 890 067, Denver, December 2, 1983. The respondent is present, Pro Se. Service represented by Mr. Brassart. Recording, sony. English language. The hearing will come to order.

JUDGE TO MR. TARASSOUM

Q. Mr. Tarassoum, do you recall your hearing started October 11, 1983. You were here. We got the Order to Show Cause in the hearing. Your case was set for hearing for today. This is a continuation of that same hearing. Do you understand?

A. All right. I do, sir.

Q. Now, the purpose of the hearing is to find out if you are subject to being deported as it is alleged and charged in the Order to Show Cause or not. If you are found to be deportable we continue with the hearing to find out if there is relief available to you so you don't have to deported from the United States. Do you understand why we are having the hearing as I have explained it?

A. Yes.

Q. Now, you got your copy of the Order to Show Cause. I see it in your file before you. We have got it in the hearing as Exhibit 1. Did you also get a legal aid list and a notice that you have a right to appeal an adverse decision, these two other papers when you got your Order to Show Cause?

A. I did, sir.

Q. Thank you. Now, at this hearing you have a right to be represented by an attorney at law of your own choice at no expense to the government or any other person or organization authorized and qualified to practice before the Immigration Service. Or you can represent yourself. That is you can speak for yourself in this hearing. Do you understand you [sic] this right of representation as explained?

A. I do, sir.

Q. Have you made arrangements to have a lawyer or some other person come down to represent you today?

A. I wish to represent myself.

Q. You certainly have that right and I will honor it. As you have elected to precede representing yourself, I will instruct you if at anytime during the hearing when something arises you do not understand

raise your right hand. When I see your hand raised, I will stop the hearing, find out from you what it is you do not understand and then make an explanation to you until that misunderstanding is completely removed from your mind. Do you promise you will raise your right hand when something arises you don't understand so I can make this explanation to you?

A. I do, sir.

Q. In addition to the rights thta [sic] you have already received you have the right to present evidence in this hearing in your behalf. You have the right to look at or make a reasonable examination of any evidence that the Immigration Service offers into the hearing to be used against you. You have the right to have witnesses appear at the hearing and give testimony in your behalf. You have the right to ask questions of any witnesses presented by the Immigration Service. This is called the right of cross-examination. You have the right to make a legal objection to any evidence that is offered into the hearing. Do you understnd [sic] these rights as explained?

A. I do understand, sir.

[Remainder of transcript omitted.]

In re: TITKI D. TARASSOUM

IN DEPORTATION PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Pro se

ON BEHALF OF SERVICE: Arnie R. Brassart
District Counsel

CHARGE:

Order: Sec. 241(a)(2), I&N Act [8 U.S.C.§ 1251(a)(2)]
Nonimmigrant - remained longer than permitted

APPLICATION: Termination of proceedings; asylum; withholding of deportation

In a decision dated July 3, 1986, the immigration judge found the respondent deportable on the charge set forth above and denied his applications for asylum and withholding of deportation under sections 208 and 243(h) of the Immigration and Nationality Act, 8 U.S.C. §§ 1158 and 1253(h), but granted him the privilege of voluntary departure. The respondent has appealed. The appeal will be dismissed. The request for oral argument before the Board is denied.

The respondent is a 36-year-old married, male native and citizen of Chad. On September 7, 1983, an Order to Show Cause was issued alleging that on

March 16, 1978, the respondent was admitted to the United States as a nonimmigrant exchange student authorized to remain until November 4, 1981, and that the respondent had remained in the United States beyond November 4, 1981, without the permission of the Service. He was charged with deportability under section 241(a)(2) of the Act, 8 U.S.C. § 1251(a)(2). The respondent admitted allegations 1, 2, and 3, in the Order to Show Cause, but denied the remaining allegations and contested deportability. On appeal, we must determine whether the immigration judge properly found the respondent deportable and properly denied the respondent's applications for asylum and withholding of deportation.

To establish the respondent's deportability, the Service submitted a Form I-94 (Arrival-Departure Record) issued to the respondent. It reflects that the respondent was admitted to the United States on March 16, 1978, as a J-1 student authorized to remain until September 29, 1978, and that extensions of his authorized stay were subsequently granted up until November 4, 1981.

With regard to the issue of deportability, the respondent testified that the Service had not granted him an extension of his authorized stay because he lacked a valid passport. He explained that he tried to comply with the Service's requirement, but that due to turmoil in his country, the Government of Chad had never responded to his repeated requests for a new passport. He said that as

his passport had a 1982 expiration date, he mailed it to the Embassy of Chad in Washington, D.C., in September 1981 to have it renewed. The respondent stated that when he called the embassy to check on his passport, he was told that it had been sent to Chad for renewal. He advised that until some time in 1983, he kept making inquiries to the embassy about the passport. According to the respondent, although embassy personnel would always tell him that they would "look into it," they never did call him back or send him his passport. He said that efforts made on his behalf by the international education programs office at his university and by an employee of the Service were also unsuccessful in obtaining a passport for him. The respondent submitted into evidence copies of letters sent to the Embassy of Chad in Washington, D.C., seeking replacement of his passport, and a copy of a form certifying that the Agency for International Development (AID) would be sponsoring the respondent in his studies from May 29, 1982, to May 28, 1983.

In addition, the respondent advised that he was married to a United States citizen who had filed an immediate relative visa petition on his behalf. He stated that he had been unable to obtain the immigrant visa because the Service had twice denied his requests under section 212(e) of the Act, 8 U.S.C. § 1182(e), for a waiver of the requirement that he first reside in Chad for at least 2 years following departure from the United States. He said that the requests were based on hardship to his wife, whose medical problems required her to take medication

regularly and who would suffer if she were to accompany him to Chad, where medical facilities and supplied were poor and conditions were violent.

The immigration judge found the respondent deportable as charged because he had not produced evidence to show that he had been authorized to remain in the United States beyond November 4, 1981. He stated that an inquiry into whether or not the respondent's overstay was justified under the circumstances was not relevant to the question of his deportability under Section 241(a)(2) of the Act.

On appeal, the respondent states that he "does not disagree with the immigration judge insofar as deportability of aliens under section 241(a)(2) is concerned." He further asserts, however, that the statute is ambiguous. In this regard, he argues that section 241(a)(2) of the Act is fundamentally unfair as it provides for deportation without either considering whether the overstay is justified or imposing a burden on United States educational institutions to seek and endorse extensions of stay for their foreign students. He contends that his overstay was justified because civil strife and political instability prevented his passport from being renewed and because he was still under the sponsorship of AID at the time the Order to Show Cause was issued. The respondent also maintains that because of the disorder in Chad, the Service should have waived the requirement for a valid passport and granted him a

discretionary extension of stay. He points out that the Order to Show Cause was issued when he went to a Service office on his own initiative to inquire about adjusting his status or applying for a discretionary extension of stay.

On the issue of deportability, the Service contends on appeal that the respondent's deportability was established by clear, unequivocal, and convincing evidence. It is further argued that section 241(a)(2) of the Act is not constitutionally defective under the void for vagueness doctrine.

We find that the immigration judge correctly determined that the respondent was deportable under section 241(a)(2) of the Act. A nonimmigrant is deportable as an overstay when it has been established that he was admitted for a temporary period, that the period has elapsed, and that he has not departed. Sadegh-Nobari v. INS, 676 F.2d 1348 (10th Cir. 1982); Milande v. INS, 484 F.2d 774 (7th Cir. 1973). The record clearly reflects that the respondent was admitted as an exchange student, that his authorized stay expired on November 4, 1981, and that he has not departed. Accordingly, we find that the respondent's deportability under section 241(a)(2) of the Act has been established by clear, unequivocal, and convincing evidence. See 8 C.F.R. § 242.14(a); Woodby v. INS, 385 U.S. 276 (1966).

The respondent maintains that section 241(a)(2) of the Act is fundamentally unfair and constitutionally void for vagueness because it does not provide for circumstances where the overstay is justified. We will not address this issue because we do not entertain constitutional challenges to the statutes we administer. See Matter of Patel, Interim Decision 3083 (BIA 1988); Matter of Awadh, 15 I&N Dec. 775 (BIA 1976); Matter of Bulos, 15 I&N Dec. 645 (BIA 1976).

We also cannot review the propriety of the district director's decision to issue an Order to Show Cause rather than to grant an extension of stay. It is within the prosecutorial discretion of the Attorney General whether the institute or to refrain from instituting deportation proceedings. Johns v. Department of Justice, 653 F.2d 884 (5th Cir. 1981). Where deportation proceedings have been instituted, the immigration judge, and this Board on appeal, must determine whether the deportation charge is supported by the requisite evidence, but may not review the wisdom of the action to start the proceedings. Guan Chow Tok v. INS, 538 F.2d 36 (2d Cir. 1976); Matter of Ramirez-Sanchez, 17 I&N Dec. 503 (BIA 1980); Matter of Marin, 16 I&N Dec. 581 (BIA 1978); Matter of Geronimo, 13 I&N Dec. 680 (BIA 1971). Similarly, neither the immigration judge nor this Board may review a district director's denial of a request for an extension of nonimmigrant stay, as the power to grant such an extension lies within the exclusive jurisdiction of the district director. See 8 C.F.R. § 214.1(c); Torabpour v.

INS, 694 F.2d 1119 (8th Cir. 1982); Kavasji v. INS, 675 F.2d 236 (7th Cir. 1982); Matter of Yazdani, 17 I&N Dec. 626 (BIA 1981); Matter of Teberen, 15 I&N Dec. 689 (BIA 1976); Matter of Sourbis, 11 I&N Dec. 335 (BIA 1965).

We turn now to the respondent's applications for asylum and withholding of deportation. The respondent testified that he came to the United States as an exchange student in March 1976 and had remained in the United States since that time except for an emergency trip to Chad in March 1978. He said that before he left Chad in 1976 he was a student, although he held jobs during the summers, including assisting his father, who was a judge. The respondent advised that he was never directly engaged in politics. He stated that the only time he had ever been detained or interrogated was when the Service arrested him in the United States for an immigration violation. The respondent testified that he did not want to return to Chad because of fighting there between several factions in which his ethnic group, the Sara, had been particularly singled out.

In his request for Asylum in the United States (Form I-589), the respondent asserts that if he returns to Chad, he will be persecuted because of his ethnic affiliation, his political views, and his refusal to interrupt his studies and return home at the request of the present government. He claims that he has heard of individuals who after being forced to return, were arrested on their

arrival and not heard from again. He contends that he has been away since before the major political breakdown in Chad in 1979, has overstayed his leave abroad, and would have difficulty adjusting to the current situation. The respondent states that his father died in 1978 and that he is unaware of the present location of his mother, two sisters, and two half-brothers, as he has not heard from his family since 1984. He points out that they lived in the southern part of the country where there has been much fighting.

The respondent further asserts in his Form I-589 that two wars are being fought in Chad. The first is between two Muslim northern groups, one led by Hissene Habre, the self-appointed president of Chad, and the other by his rival, Wodei Goukouni. The second war is between the Muslim northerners and the non-Muslim southerners. He advises that some members of the Sara ethnic group in the south are presently in rebellion against Habre. According to the respondent, there have been reports that forces loyal to Habre have been detaining, torturing, and killing thousands of prominent civilians in the southern part of the country. The respondent further points out that his father belonged to a political party denounced by Muslim northerners, including Habre, and was a judge under two administrations which were very much resented by Habre. He also notes that one of his father's cousins, who died in 1974, was a politician in the south, serving as the subprefect of Maro.

In addition, the respondent states in his asylum application that he was vice president of the Association of Chad Students in the United States from 1977 to 1982. He says that although the organization was nonpolitical, they voiced their criticisms of the civil war in Chad to various warring factions through a telegram sent to the Chad Embassy in Lagos, Nigeria.

With his application, the respondent submitted two February 1985 letters sent to him from friends living outside of Chad who had received news from correspondents there. Both tell the respondent that military action by Habre's forces has caused the inhabitants of Maro to flee and resulted in the deaths of many civilians there. The respondent also submitted a copy of the telegram sent to the Embassy of Chad in Lagos, Nigeria, on August 10, 1979, by the Association of Chad in Lagos, Nigeria, on August 10, 1979, by the Association of Chad Students in the United States. In that telegram, the association protests the massacre of 20,000 Chadians in the previous 7 months of civil war and demands an end to hostilities and revenge, supervision by neutral forces, and the establishment of democratic institutions. In addition, the respondent offered into evidence a January 24, 1980, letter to the Embassy of Chad sent by the respondent as vice president of the Association of Chad Students in the United States. In that letter, the respondent asks for help as Chad students in the Chad Range and Livestock Development Project

have been told that after the May 1980 expiration of the project, no funds will be available and they will be required to leave the United States. He states in the letter that because of the explosive political and military situation and the economic stagnation in Chad, the students, who love their country and wish to return once peace and harmony are restored, request an extension for their studies in the United States.

In support of his applications, the respondent submitted various background documents, including reports from Amnesty International and magazine articles from New African and Africa Report. These documents reflect that in 1982, forces loyal to Habre asserted control over southern Chad and thereafter reportedly carried out beatings, detentions, and summary executions against people in the area, primarily civilian noncombatants, suspected of collaborating with guerrilla groups opposed to the Habre government. An article dated November 1984 from the New African states that there are several different guerrilla groups operating in Southern Chad and most members are from the Sara tribe. According to a New African article dated July 1985, Habre launched military operations to defeat the guerrillas in southern Chad because they were threatening the smooth functioning of the cotton industry by attacks and disruption of the distribution and collection of cotton. In a March 1986 article, the New African reports that Habre was engaged in slow-moving peace talks with opponents and was under pressure to negotiate by foreign countries

and by continuing guerrilla activity in southern Chad. It also states that during the previous year, guerrilla activity had caused a disastrous crop of cotton, Chad's major export, and was expected to result in a much lower 1985 cotton crop.

In his decision, the immigration judge found that the respondent had failed to demonstrate a well-founded fear or a clear probability of persecution in Chad. He therefore denied his applications for asylum and withholding of deportation.

On appeal, the respondent contends that he has shown a well-founded fear of persecution because of the random detention and execution without trial of civilians by government forces. He asserts that as a southerner of the Sara ethnic group, he would be kept under very close scrutiny in Chad, suspected of being a potential danger to the government, included on a "hit list," and persecuted according to Habre's policy. The respondent further states that "the random mass executions of civilians from the Sara ethnic group might have subsided beginning [in] 1986, as a result of international pressure" but adds that "there is no evidence to date that persecution on [an] individual basis" has ceased. He asserts that his refusal to return to Chad as requested by that country in October 1983 could be seen as an act against the Habre government, and that the government's refusal to issue him a new passport indicates that it "might have something against" him.

With his appeal, the respondent submitted several documents, including various pieces of correspondence reflecting that in August 1983, Chad participants in the respondent's exchange program were informed that the Government of Chad was requesting that they return home as soon as possible because of the lack of funds and the government's belief that they should fulfill their 2-year service obligation. In addition, he attached a translation of a July 1985 article from Afrique-Asie containing the confession of a man who claims to have been involved in the May 1985 killing of the chief inspector and chief of staff of the customs service in N'Djamena. He states that the victim had already been on a "black list" awaiting the least mistake because he was a member of the Sara ethnic group, and was killed because he was an "inconvenient witness" who knew too much about corruption in the customs service and who had complained about the illegal practices to a colleague. The respondent notes at the end of the translation that the man killed was his cousin. The respondent also submitted excerpts from a 1977 reference book on Chad setting forth the ethnic breakdown of the population and describing Habre, the Sara ethnic group, and Wodei Goukouni.

The Service contends that the decision of the immigration judge was correct. It is argued that the respondent has failed to show a well-founded fear of persecution because his claim is principally based on

unrest and civil strife in Chad which threatens life or freedom generally.

The respondent bears the evidentiary burdens of proof and persuasion in any application for withholding of deportation under Section 243(h) or asylum under section 208 of the Act. Matter of Acosta, Interim Decision 2986 (BIA 1985), overruled on other grounds, Matter of Mogharrabi, Interrim Decision 3028 (BIA 1987); 8 C.F.R. §§ 208.5, 242.17(c).

To be eligible for withholding of deportation pursuant to section 243(h) of the Act, an alien's facts must show a clear probability of persecution in the country designated for deportation, on account of race, religion, nationality, membership in a particular social group, or political opinion. INS v. Stevic, 467 U.S. 407 (1984). This means that the alien's facts must establish that it is more likely than not he would be subject to persecution for one of the grounds specified. Id.

To be eligible for asylum under section 208 of the Act, an alien must meet the definition of a "refugee," which requires him to show persecution or a well-founded fear of persecution in a particular country on account of race, religion, nationality, membership in a particular social group, or political opinion. Section 101(a)(42)(A) of the Act, 8 U.S.C. § 1101(a)(42)(A); section 208 of the Act. The burden of proof required to establish eligibility for asylum is lower than that required for withholding of

deportation. INS v. Cardoza-Fonseca, ___ U.S. ___, 107 S. Ct. 1207 (1987). An applicant for asylum has established a well-founded fear if he shows that a reasonable person in his circumstances would fear persecution for one of the five grounds specified in the Act. Matter of Mogharrabi, supra.

In addition, general allegations of political upheaval which affects the populace as a whole are insufficient to establish an alien's eligibility for asylum and withholding of deportation. See Sarvia-Quintanilla v. INS, 767 F.2d 1387 (9th Cir. 1985); Matter of Martinez-Romero v. INS, 692 F.2d 595 (9th Cir. 1982); Matter of Sanchez and Escobar, Interim Decision 2996 (BIA 1985), aff'd sub nom. Sanchez-Trujillo v. INS, 801 F.2d 1571 (9th Cir. 1986).

In the case before us, the respondent has not shown a well-founded fear of persecution under section 208 of the Act, based on any of the enumerated grounds within the Act for which asylum may be granted. The violence in recent years which has resulted in the mistreatment and death of many civilians in southern Chad appears to have arisen from conditions of civil war. The evidence indicates that as Habre was consolidating his control over most of Chad, many in the south refused to accept his leadership and rebelled against him. Guerrilla groups, composed primarily of members of the Sara ethnic group, engaged in violence and seriously interfered with the harvest of the cotton crop, Chad's

main export, while forces loyal to Habre took military action to defeat the guerrillas and retaliated against civilians suspected of supporting the guerrillas. The respondent has not shown that any problems he might encounter as a result of the general conditions of political upheaval would constitute persecution for one of the five grounds specified in the Act. Moreover, the evidence reflects, and the respondent acknowledged in his brief on appeal, that the random violence in southern Chad has decreased substantially as Habre began participating in peace talks with his opponents.

Further, the respondent's assertion that he would be particularly singled out for persecution by the Habre government is speculative. When the respondent lived in Chad, he was a student and was never directly involved in politics. Except for an emergency trip home in March 1978, he has not been in Chad since March 1976, before the current political unrest began. Although his father and one of his father's cousins were politically active, they both died over a decade ago. The group to which the respondent belongs in the United States, the Association of Chad Students, is nonpolitical. In addition, the respondent has not shown that the authorities have any interest in him because of the telegram the group sent to the Embassy of Chad in Lagos, Nigeria, on August 10, 1979, criticizing the civil war in Chad. The respondent's name did not appear on that telegram and there is no evidence that the government took any action against the group members as a result of it. Similarly, it has not

been shown that the authorities were annoyed by the letter the respondent sent on January 24, 1980, as vice president of his group, seeking funds for Chad students to continue their studies here beyond the May 1980 expiration of their project. Although the response to the letter is not indicated, the record reflects that the Chad students somehow remained in their programs and were not summoned home by their country as a group until over 3 years later.

In addition, because of the upheaval in Chad at the time the respondent's passport was sent to that country for renewal in late 1981, it has not been shown that the failure to return the passport was the result of anything other than bureaucratic inattention or mishandling. There is no support for the respondent's speculation that the failure to return his passport may mean that the government has "something against" him. We note that the Government of Chad never informed the respondent that it was denying his request for a passport or that his passport was being withheld because it wanted him to cease his studies and return to Chad. When the respondent was finally summoned home, he was recalled together with all the Chad exchange students in his program.

Moreover, the respondent has not established that he has a well-founded fear of persecution because he did not return to Chad in 1983 when he was requested to do so by the Government of Chad. There is no evidence

that the Chad authorities have sent any communications to the respondent or his American sponsors regarding his continued absence from Chad. Also, it has not been shown that any actions the government might take against the respondent in this regard would constitute persecution for one of the grounds specified in the Act rather than a penalty for his failure to comply with the terms of his exchange agreement.

Inasmuch as the respondent has failed to satisfy the lower burden of proof required for asylum, it follows that he has also failed to satisfy the clear probability standard of eligibility required for withholding of deportation. The evidence does not establish that it is more likely than not that the respondent would be subject to persecution on account of one of the five grounds specified in section 243(h) of the Act.

In his brief on appeal, the respondent has also argued that he merits a waiver of the 2-year residency requirement under section 212(e) of the Act. We will not address this issue because we have no authority to grant or to review the denial of a waiver of the 2-year foreign residency requirement. Matter of Baternia, 16 I&N Dec. 127 (BIA 1977); Matter of Mombo, 15 I&N Dec. 1 (BIA 1974); see 8 C.F.R. § 103.1(f)(2)(vii); 8 C.F.R. § 212.7(c).

The respondent further requests on appeal that the immigration judge's order of deportation to the Ivory Coast be eliminated and that deportation be ordered

directly to Chad. At the hearing, the respondent initially requested that the Ivory Coast be the country to which he would be deported if deportation were necessary, and the immigration judge designated Chad as an alternative country (Tr. at 24). Before the hearing was concluded, however, the respondent withdrew his designation of the Ivory Coast and requested that Chad be the country to which deportation would be ordered (Tr. at 42). We will therefore enter an order of deportation specifying Chad as the country to which the respondent will be deported if he fails to depart pursuant to the grant of voluntary departure.

The respondent has submitted additional documents on appeal. We conclude that remand for consideration of this evidence by the immigration judge is not warranted. See Matter of Williams, 16 I&N Dec. 697 (BIA 1979).

Accordingly, the appeal will be dismissed and the following orders will be entered.

ORDER: The appeal is dismissed.

FURTHER ORDER: The respondent is permitted to depart from the United States voluntarily within 30 days from the date of this order or any extension beyond that time as may be granted by the district director.

FURTHER ORDER: In the event that the respondent fails to depart when required, the privilege of voluntary departure shall be withdrawn and the respondent shall be deported from the United States to Chad.

/s/ James P. Morris
FOR THE BOARD

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

TITKI D. TARASSOUM,	)	
	)	
Petitioner,	)	No. 89-9535
	)	On Petition For Review
v.	)	Of Order Of The Board
	)	Of Immigration Appeals
IMMIGRATION & NATURALIZATION SERVICE,	)	(No. A 24 890 067)
	)	
Respondent.	)	

ORDER AND JUDGMENT*

Before BALDOCK, SETH and BRORBY, Circuit Judges.

---

* This order and judgment has no precedential value and shall not be cited, or used by any court within the Tenth Circuit, except for purposes of establishing the doctrines of the law of the case, res judicata, or collateral estoppel. 10th Cir. R. 36.3.

After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist the determination of this appeal. See Fed. R. App. P. 34(a); 10th Cir. R. 34.1.9. The cause is therefore ordered submitted without oral argument.

Pro se petitioner Tarassoum seeks review of a final order of the Board of Immigration Appeals ("BIA") dismissing his appeal from the order of an immigration judge. The immigration judge found Tarassoum deportable under 8 U.S.C. § 1251(a)(2) for exceeding his stay and denied him asylum under 8 U.S.C. §§ 1158 and 1253(h). Tarassoum challenges both rulings. He contends that the immigration statutes were incorrectly applied to the specific facts resulting in an abuse of discretion. This court has jurisdiction to review a decision of the BIA pursuant to 8 U.S.C. § 1105a(a). For the reasons that follow, we affirm the BIA's decision finding Tarassoum deportable.

Our review of the findings below is limited to the administrative record forming the basis for the deportation order. 8 U.S.C. § 1105(a)(4); Michelson v. INS, 897 F.2d 465 (10th Cir.). The record shows that petitioner is a native citizen of Chad and is a member of the Sara tribe in southern Chad. Tarassoum entered the United States on March 16, 1978 as a non-immigrant exchange student at New Mexico State University sponsored by the Agency for International Development. He applied for

and received stays from the Immigration and Naturalization Service ("INS") allowing him to legally remain in the United States until November 4, 1981. Tarassoum alleged that he was unable to petition for an additional stay after November 4 because Chad officials delayed renewal of his passport.

On September 7, 1983 an Order to Show Cause was issued charging petitioner with deportation for non-immigrant overstay under 8 U.S.C. § 1251(a)(2). Tarassoum initially appeared before an immigration judge for a hearing on December 2, 1983. The judge continued the hearing to allow Tarassoum to file an I-589 form requesting asylum. The hearing resumed on July 3, 1986, and the judge held that petitioner's overstay had been proved by "clear, convincing and unequivocal" evidence. Admin. Rec. at 104. The judge denied his application for asylum and withholding of deportation stating that his claim did not meet statutory requirements. Tarassoum filed a timely appeal with the BIA which upheld the immigration judge's decision and affirmed the deportation order.

Tarassoum initially challenges his deportation for overstaying his visa. He argues that the evidence in the record does not support the order finding him deportable. He contends that INS counsel at his immigration hearing admitted that his overstay was justified under the circumstances and that this admission nullified the charges brought against him. His support for this argument

comes from a statement made by the immigration judge in his written opinion. The statement reads, "Counsel, in essence, argues that the respondent's overstay was justified under the circumstances." Admin. Rec. at 104.

The INS cites to the record and claims no such admission was made. The INS believes the statement by the judge intended to refer to petitioner's claim that his overstay was justified, not a claim made by INS counsel. After reviewing the record and placing the immigration judge's statement in context we agree with the INS. We do not believe that the INS would file an Order to Show Cause, argue for deportation at the hearing, and then admit that Tarassoum's overstay was justified.

Moreover, sufficient facts were introduced to support the BIA's finding that Tarassoum overstayed his visa regardless of whether Tarassoum had an argument that the overstay was justified. We have previously held that a deportation order for "overstay" will be upheld if the INS proves by clear, unequivocal and convincing evidence that "(1) the alien was admitted for a temporary period, (2) that period has elapsed, and (3) the alien has not departed." Che-Li Shen v. INS, 749 F.2d 1469, 1472 (10th Cir.). Tarassoum admitted that he entered the United States as a non-immigrant student; the INS introduced an I-94 form at trial showing that petitioner's legal stay in this country expired on November 4, 1981; and petitioner does not deny the fact that he remained in this country after the November 4 date. This is certainly

sufficient to support the immigration judge's finding that the evidence was clear, convincing and unequivocal. We find no merit to Tarassoum's argument that he was somehow coerced to remain in the United States.

Tarassoum also contends that his initial detention by INS officials in September 1983 violated statutory procedure and was unconstitutional. Tarassoum claims that both his Fourth and Fifth Amendment rights were violated when INS officials detained him and took his passport and I-94 forms. He also argues that his detention was an abuse of discretion in light of his planned departure from the United States 22 days later. We reject both arguments.

Our review of the record indicates that INS officers acted within their authority in detaining the petitioner. When petitioner entered their offices in September 1983 to apply for an additional stay, his I-94 form showed that he had been illegally in this country for more than two and a half years. This was in clear violation of INS regulations which require an alien seeking an extension of his stay to apply "at least fifteen days but not more than sixty days before the expiration of the alien's currently authorized stay." 8 C.F.R. § 214.1(c)(2). Under these circumstances, we find that the INS action placing Tarassoum in custody was justified.

Petitioner argues for the first time in this appeal that actions by INS officers at the September 1983 meet-

ing violated his Fourth and Fifth Amendment rights. The INS is correct in stating that as a general rule, an alien seeking judicial review of an issue must first exhaust all administrative remedies. 8 U.S.C. § 1105a(c); Pilapil v. INS, 424 F.2d 6 (10th Cir.). The BIA, however, does not have jurisdiction to adjudicate constitutional issues outside of procedural errors correctable by the administrative tribunal. Bagues-Valles v. INS, 779 F.2d 483 (9th Cir.); Reid v. Egan, 765 F.2d 1457, 1461 (9th Cir.). Therefore, we have jurisdiction to hear Tarassoum's constitutional claims.

Nonetheless, we find that Tarassoum's constitutional arguments are without merit. As we recently stated, "[a] deportation proceeding is civil in nature, not criminal, and various constitutional protections associated with criminal proceedings therefore are not required." Michelson, 897 F.2d at 467 (citing INS v. Lopez-Mendoza, 468 U.S. 1032, 1038-39). A petitioner in a deportation hearing does not have a Fourth Amendment right to have evidence excluded. Lopez-Mendoza, 468 U.S. at 1050. While a petitioner is entitled to the notions of fundamental fairness contained in the Fifth Amendment guarantee of due process, he or she must demonstrate prejudice implicating the fundamental fairness of the proceeding before we will intervene. Michelson, 897 F.2d at 468. Applied to the present case, we do not believe that the actions taken by INS officers during the September 1983 meeting with Tarassoum resulted in prejudice implicating

the fundamental fairness of Tarassoum's deportation proceeding.

Petitioner also challenges the BIA's finding that he does not qualify for asylum under 8 U.S.C. § 1158 or a withholding of deportation proceedings under 8 U.S.C. § 1253(h). To obtain asylum, a petitioner must show a "well-founded fear of persecution" were he to be deported to his native country. To obtain a withholding of deportation, the standard is whether petitioner has shown a "clear probability of persecution." Tarassoum contends that both the BIA and the immigration judge failed to differentiate between the applicable standards of proof for either form of relief. We disagree.

Because application of the correct standard of proof is a question of law, we review the BIA's order de novo. See Hopkinson v. Shillinger, 866 F.2d 1185, 1197 (10th Cir.). Petitioner is correct in stating that the standard of proof for asylum and withholding is not the same. In INS v. Cardoza-Fonseca, 480 U.S. 421, 431, the Supreme Court held that the "well-founded fear" standard is subjective and can be met when "there is less than a 50% chance of the occurrence taking place." The "clear probability of persecution" standard is objective and "requires the alien to establish by objective evidence that it is more likely than not that he or she will be subject to persecution upon deportation." Id. at 430.

The petitioner is incorrect, however, in arguing that the BIA did not understand this distinction. The BIA's order specifically states that "[t]he burden of proof required to establish eligibility for asylum is lower than that required for withholding of deportation." Admin. Rec. at 8 (citing Cardoza-Fonseca). Moreover, the record indicates that the BIA applied the different standards of proof to Tarassoum's case. We therefore reject petitioner's argument.

Petitioner's challenge to the BIA's application of the law to the facts of his case presents a closer question. Tarassoum argues that the evidence introduced before the immigration judge and the BIA was sufficient to qualify him as a refugee with a "well-founded fear" of persecution due to race, religion, nationality, membership in a particular social group, or political opinion. 8 U.S.C. § 1101(a)(42)(A). He relies in large part on the following statement by the immigration judge:

> "As to the respondent's claim of fear for returning to Chad, I have no doubt that the respondent has a subjective fear of [returning] to Chad. His testimony and the supporting documentations establish the civil strife that exists in Chad and I find that the factual basis upon which the respondent's claim for asylum is based and the respondent's testimony establish that he has a subjective fear of returning to Chad."

Admin. Rec. at 108. Tarassoum equates this subjective fear to a "well-founded fear."

As an initial matter, our jurisdiction under 8 U.S.C. § 1105 focuses primarily on the decision of the BIA not the findings of the immigration judge. See Kabongo v. INS, 837 F.2d 753 (6th Cir.); Hernandez-Robledo v. INS, 777 F.2d 536 (9th Cir.). We apply a two-part analysis in reviewing the BIA's determination of whether an alien qualifies for asylum. We determine if a finding is supported by substantial evidence, and if so, we apply an abuse of discretion standard to the BIA's decision to grant or deny asylum. See Garcia-Ramos v. INS, 775 F.2d 1370, 1373 (9th Cir.).

After reviewing the record below, we believe the BIA's decision was supported by substantial evidence and that the BIA did not abuse its discretion in rejecting petitioner's application for asylum. Tarassoum's argument that his membership in the Sara tribe singled him out for persecution was considered and rejected by the BIA. The BIA carefully analyzed the political climate in Chad and found that random persecution of the Sara ethnic group was declining. In reaching this decision, the BIA focused on the fact that Tarassoum left the country in 1976 before the civil war began; was not personally involved in political activities involving the Chad government of Hissene Habre; and had no living relatives in Chad who were politically active.

While we certainly understand Tarassoum's apprehension and fear about returning to the unstable political climate in Chad, we agree with the BIA that this subjective fear alone is insufficient to meet the statutory standard for asylum. As the Ninth Circuit stated in defining the "well-founded" fear standard:

> "A partially subjective standard is, of course, also partially objective. Thus, proof of even a sincere and deeply-felt fear is not itself enough to establish an alien's eligibility for political asylum. That fear must be 'well-founded.' There must always be some direct, credible evidence supporting the claim. In addition, the evidence should be sufficiently specific to indicate that the alien's predicament is appreciably different from the dangers faced by all his countrymen."

Sarvia-Quintanilla v. INS, 767 F.2d 1387, 1394 (9th Cir.) (citations omitted) (emphasis in original).

As a final matter, we reject petitioner's arguments regarding the BIA's imposition of a 30-day period during which Tarassoum could voluntarily depart the United States. It is clear from the statute that the period of time given an alien to voluntarily depart is within the discretion of the Attorney General. See 8 U.S.C. § 1254(a). The BIA is not required to give the petitioner a six-month voluntary departure period as he suggests.

The BIA gave petitioner 30 days from the date of its order to depart and the petitioner failed to do so. We find nothing in the record to indicate that the BIA abused its discretion and we do not have jurisdiction to extend or reinstate the petitioner's right to voluntarily depart this country. See 8 C.F.R. § 244.2.

Accordingly, the BIA's order is AFFIRMED.

Entered for the Court

Oliver Seth
Circuit Judge

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

TITKI D. TARASSOUM,	)	
	)	
Petitioner,	)	
	)	
v.	)	No. 89-9535
	)	
IMMIGRATION & NATURALIZATION SERVICE,	)	
	)	
	)	
Respondent.	)	

ORDER

Filed January 11, 1991

Before HOLLOWAY, Chief Judge, SETH, McKAY, LOGAN, SEYMOUR, MOORE, ANDERSON, TACHA, BALDOCK, BRORBY and EBEL, Circuit Judges.

This matter comes on for consideration of petitioner's petition for rehearing and suggestion for rehearing en banc in the captioned case.

Upon consideration whereof, the petition for rehearing is denied by the panel that rendered the decision sought to be reheard.

In accordance with Rule 35(b) of the Federal Rules of Appellate Procedure, the suggestion for rehearing en banc was transmitted to all the judges of the court in regular active service. No member of the panel and no judge in regular active service on the court having requested that the court be polled on rehearing en banc, Rule 35, Federal Rules of Appellate Procedure, the suggestion for rehearing en banc is denied.

Entered for the Court

/s/ Robert L. Hoecker
ROBERT L. HOECKER, Clerk

DECLARATION OF TITKI D. TARASSOUM

I, Titki D. Tarassoum, declare and state as follows:

1. If called to testify, I could and would competently testify to the following facts which are within my personal knowledge.

2. I am the petitioner in the within action. I appeared before Immigration Judge Jesse Sellers (the "IJ") in a deportation hearing which was held in Denver, Colorado on December 2, 1983, continued again to July 3, 1986.

3. Prior to the hearing before the IJ, I received a "legal aid list" from the Immigration and Naturalization Service (the "INS"). This legal aid list listed the names of only two organizations: Catholic Immigration and Colorado Rural Legal Services, Inc. A true and correct copy of the legal aid list is attached as Exhibit A.

4. I independently investigated Catholic Immigration Services and Colorado Rural Legal Services, Inc. However, both refused to represent me because my case was too complicated.

5. Catholic Immigration Services charged approximately $30 per visit and referred me to a private attorney, Kenneth H. Stern, who charged a retainer of

$1,250 and an hourly rate of $125, rates I could not afford.

6. Although Colorado Rural Legal Services did not charge a fee, they similarly referred me to another private attorney, Paul Silas. Mr. Silas charged $25 for an initial visit and a retainer fee of approximately $5,000.

7. Based on the legal aid list and the comments of the IJ at the hearing, I did not understand that I had the right to pursue free legal representation. I wished to be represented by counsel but was unable to locate any I could afford.

8. Although I was finally able to obtain free legal counsel, I was unable to complete the substitution of counsel until December 7, 1990 -- well after the entry of this Court's Order and Judgement. True and correct copies of the Substitution of ATtorney and Entry of Appearance and Certificate of Interested parties are attached hereto as Exhibits B and C, respectively.

I declare under penalty of perjury that the foregoing is true and correct.

EXECUTED on this 31st day of December 1990, at Sonoma County, California.

/s/ T. Tarassoum
Titki D. Tarassoum

Supreme Court, U.S.
FILED
MAY 31 1991
OFFICE OF THE CLERK

(2)

No. 90-1460

In the Supreme Court of the United States

OCTOBER TERM, 1990

TITKI D. TARASSOUM, PETITIONER

V.

IMMIGRATION AND NATURALIZATION SERVICE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

KENNETH W. STARR
Solicitor General
STUART M. GERSON
Assistant Attorney General
DAVID J. KLINE
LORI L. SCIALABBA
Attorneys
Department of Justice
Washington, D.C. 20530
(202) 514-2217

QUESTIONS PRESENTED

1. Whether petitioner waived his statutory right to counsel in deportation proceedings.

2. Whether the Board of Immigration Appeals applied the proper legal standard in evaluating petitioner's asylum claim.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	2
Argument	4
Conclusion	8

TABLE OF AUTHORITIES

Cases:

Blanco-Comarribas v. *INS*, 830 F.2d 1039 (9th Cir. 1987)	7
Burquez v. *INS*, 513 F.2d 751 (10th Cir. 1975)	6
Garcia-Ramos v. *INS*, 775 F.2d 1370 (9th Cir. 1985)	7
INS v. *Bagamasbad*, 429 U.S. 24 (1976)	8
INS v. *Cardoza-Fonseca*, 480 U.S. 421 (1987)	2–3
INS v. *Lopez-Mendoza*, 468 U.S. 1032 (1984)	4
Johnson v. *Zerbst*, 304 U.S. 458 (1938)	4
Kubon v. *INS*, 913 F.2d 386 (7th Cir. 1990)	7
Michelson v. *INS*, 897 F.2d 465 (10th Cir. 1990)	4
Rodriguez-Rivera v. *INS*, 848 F.2d 998 (9th Cir. 1988)	7

Constitution, statutes and regulations:

U.S. Const.:	
Amend. IV	3
Amend. V	3, 4
Due Process Clause	4
Amend. VI	4
8 U.S.C. 1105a(a)	7
8 U.S.C. 1362	4
8 C.F.R. 242.16(a)	4, 5, 6
8 C.F.R. 292a.2	5

In the Supreme Court of the United States

OCTOBER TERM, 1990

No. 90-1460

TITKI D. TARASSOUM, PETITIONER

V.

IMMIGRATION AND NATURALIZATION SERVICE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals, Pet. App. D1–D11, the decision of the Board of Immigration Appeals, Pet. App. C1–C19, and the oral decision of the immigration judge, Pet. App. A1–17, are unreported.

JURISDICTION

The judgment of the court of appeals was entered on November 20, 1990. A petition for rehearing was denied on January 11, 1991. Pet. App. E1. The petition for a writ of certiorari was filed on February 14, 1991. The

jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner is a native and citizen of Chad who was admitted to this country as a nonimmigrant exchange student. His authorization to stay in the United States expired on November 4, 1981, and the Immigration and Naturalization Service (INS) subsequently placed him in deportation proceedings. Pet. App. C1–C2.

At the outset of the hearing, the immigration judge asked petitioner if he had received a list of legal aid organizations. Pet. App. B3. Petitioner replied that he had. *Ibid.* The immigration judge then informed petitioner that he had the right to be represented by an attorney at no expense to the government or he could represent himself. *Ibid.* The immigration judge asked petitioner: "Do you understand * * * this right of representation as explained?" *Ibid.* Petitioner replied: "I do, sir." *Ibid.* Petitioner then informed the immigration judge: "I wish to represent myself." *Ibid.*

The immigration judge asked petitioner to raise his hand if something arose during the hearing that he did not understand. Pet. App. B4. The judge also told petitioner that he had the right to present evidence, including witnesses, and the right to question the INS's evidence and witnesses. *Ibid.* Petitioner told the immigration judge that he understood those rights. *Ibid.*

After two continuances, the immigration judge concluded the hearing and announced his oral opinion. He found that the INS had proved petitioner's deportability by "clear, convincing, and unequivocal" evidence and that petitioner was not eligible for asylum or withholding of deportation. Pet. App. A11–A16.

2. The Board of Immigration Appeals (BIA) dismissed petitioner's appeal. Pet. App. C1. Although it noted that "[t]he burden of proof required to establish eligibility for asylum is lower than that required for

withholding of deportation," *id.* at C13–C14 (citing *INS* v. *Cardoza-Fonseca*, 480 U.S. 421 (1987)), the BIA found that petitioner was not eligible for asylum because he had no well-founded fear of persecution in Chad. Pet. App. C14. The BIA's conclusion rested on the following findings: petitioner was a student and was never directly involved in politics; he had not been in Chad since March 1976, before political unrest had begun; his father and one of his father's cousins, who were politically active, both died over a decade ago; the group to which petitioner belonged in the United States, the Association of Chad Students, is nonpolitical; when he was summoned home in 1983, petitioner was recalled with all the Chad exchange students in his program; and petitioner had not shown that his inability to renew his passport was anything more than bureaucratic inattention or mishandling by the government of Chad. *Id.* at C15–C16. Because petitioner failed to satisfy the lower burden of proof required for asylum, the BIA reasoned that petitioner had also failed to demonstrate his eligibility for withholding of deportation. *Id.* at C17.

3. The court of appeals affirmed in an unpublished opinion. First, the court held that "sufficient facts were introduced to support the BIA's finding that [petitioner] overstayed his visa." Pet. App. D4. Second, the court held that the INS's initial decision to detain him did not violate petitioner's Fourth or Fifth Amendment rights since it did not result "in prejudice implicating the fundamental fairness of" petitioner's civil deportation proceeding. *Id.* at D6–D7. Third, the court held that the BIA had applied the correct legal standard in reviewing petitioner's applications for asylum and withholding of deportation, *id.* at D8, and that its decision that petitioner was not eligible for either form of relief was supported by substantial evidence—namely, "that [petitioner] left the country in 1976 before the civil war began; was not personally involved in political activities involving the Chad government of

Hissene Habre; and had no living relatives in Chad who were politically active," *id.* at D9.

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or another court of appeals. Moreover, the court of appeals' decision is unpublished and thus is not precedent even in its circuit of origin.

1. Petitioner insists that his decision to waive his statutory right to counsel, 8 U.S.C. 1362, was invalid because it was not "an intentional relinquishment or abandonment of a known right or privilege." *Johnson* v. *Zerbst*, 304 U.S. 458, 464 (1938); Pet. 15. That contention, first raised in petitioner's suggestion of rehearing en banc in the court of appeals, is without merit, for two independent reasons.

a. First, the *Zerbst* waiver standard, which is drawn from the defendant's Sixth Amendment right "[i]n all criminal prosecutions * * * to have the Assistance of Counsel for his defence," 304 U.S. at 462, has no application to petitioner's hearing, because "[a] deportation proceeding is a purely civil action." *INS* v. *Lopez-Mendoza*, 468 U.S. 1032, 1038 (1984). Nor does the Fifth Amendment's Due Process Clause make waivers of counsel contingent on satisfaction of the *Zerbst* standard. Petitioner's sole authority for that contention is *Michelson* v. *INS*, 897 F.2d 465 (10th Cir. 1990). But in *Michelson* the court *rejected* a pro se alien's petition for review of his deportation order and held that "[w]hile a petitioner is entitled to due process in a deportation proceeding, due process is not equated automatically with a right to counsel." *Id.* at 468.

b. Second, petitioner's challenge to the validity of his waiver presupposes that the immigration judge failed to inform petitioner of his rights as required by 8 C.F.R. 242.16(a). Pet. 16 & n.5. The essential predicate of petitioner's argument does not exist.

BEST AVA

The regulation on which petitioner relies requires the immigration judge to advise the alien of "his right to representation, at no expense to the Government," and of

> the availability of free legal services programs qualified under Part 292a of this chapter and organizations recognized pursuant to § 292.2 of this chapter, located in the district where the deportation hearing is being held.

8 C.F.R. 242.16(a). The regulation further requires the immigration judge to "ascertain that the [alien] has received a list of such [legal services] programs." *Ibid.*

In this case, the immigration judge told petitioner that he had "a right to be represented by an attorney at law of [his] own choice at no expense to the government." Pet. App. B3. The judge also asked petitioner whether he got "a legal aid list." *Ibid.* The judge's question notified petitioner that legal aid programs were available. Petitioner's answer indicated that he had received the list, *ibid.*, and satisfied the regulation's requirement that the judge ascertain that the alien actually received the legal aid list. Petitioner plainly understood the immigration judge's description of his rights: he is an English-speaking student who came to the United States to pursue a Ph.D. in range management, *id.* at A3, B1, and at the time his deportation hearing commenced, he had lived in the United States for more than five years.

Notwithstanding the immigration judge's literal compliance with the regulation, petitioner—for the first time in this Court—faults the judge for not explaining that legal aid organizations must offer "*free* legal services" and for not asking petitioner whether he had tried to obtain counsel. Pet. 17. The regulation requires neither procedure. The legal aid organizations on the list furnished by the INS "provide[] free legal services to *indigent* aliens," 8 C.F.R. 292a.2 (emphasis added); a particular alien has no right to

ILABLE COPY

free legal services under the regulation. Nor does the regulation require the immigration judge to use the words "free legal services programs" rather than "legal aid," or ask the alien whether he tried to obtain legal counsel. The immigration judge furnished petitioner with all the information to which he was entitled under 8 C.F.R. 242.16(a), and that information provided a sufficient basis for petitioner to make an informed decision whether to represent himself.

Because petitioner validly waived his statutory right to counsel, this case does not present any question regarding the appropriate remedy for a violation of that right.*

2. Petitioner contends that the BIA and the immigration judge failed to recognize that eligibility for asylum requires a lower risk of persecution ("well-founded fear") than does eligibility for withholding of deportation ("clear probability"). Petitioner further contends that he is eligible for asylum under the "subjective component" of the "well-founded fear" standard. Pet. 24–25.

a. The BIA correctly stated that petitioner would be eligible for asylum if he had a "well-founded fear of persecution." Pet. App. C13. It noted that the "well-founded fear" standard is more generous than the "clear probability" standard applied to applications for withholding of deportation. *Id.* at C13–C14. And it cited this Court's decision in *Cardoza-Fonseca*, which differentiates between the two forms of relief. *Id.* at C14. The BIA then evaluated petitioner's asylum claim under the more generous standard. *Id.* at C14–C17. On appeal, the court of appeals determined that the BIA recognized the difference between the two standards

---

* Although petitioner claims that the Tenth Circuit, in *Burquez* v. *INS*, 513 F.2d 751, 755 (1975), requires a greater showing of prejudice than other circuits have required, Pet. 22, there is no indication that the lower court applied that standard

and applied the different standards of proof to [petitioner's] case." *Id.* at D8.

Although petitioner appears to concede that the BIA correctly understood the legal standard governing asylum claims, Pet. 25, he contends that the immigration judge (who rendered his opinion before this Court decided *Cardoza-Fonseca*) erroneously judged petitioner's asylum application under the "clear probability" standard, Pet. 24–25. Any error in the immigration judge's oral opinion could not have prejudiced petitioner's asylum claim, however, because the BIA reviewed that opinion. When the BIA undertakes such review, its decision, and not the immigration judge's, is the final order of deportation and only it is subject to review by the court of appeals. *Kubon* v. *INS*, 913 F.2d 386, 387 (7th Cir. 1990) (citing *Rodriguez-Rivera* v. *INS*, 848 F.2d 998, 1002 (9th Cir. 1988)); 8 U.S.C. 1105a(a).

b. Although petitioner acknowledges that the BIA cited the proper standard of review to be applied to asylum claims, he maintains that it did not properly apply that standard to his particular claim. Pet. 25. That fact-bound contention is belied by the BIA's careful dissection of petitioner's claims, Pet. App. C14–C17, and by the court of appeals' determination that "the record indicates that the BIA applied the different standards of proof to [petitioner's] case," *id.* at D8.

Petitioner claims that the BIA "did not apply the subjective component of the 'well-founded fear' test." Pet. 25. As petitioner concedes, Pet. 26 n.10, however, a subjective fear of persecution is not enough to qualify for asylum. A subjective fear must be "well-founded"—*i.e.*, it must have an objective basis proved through documentary evidence or credible, persuasive testimony. *Blanco-Comarribas* v. *INS*, 830 F.2d 1039, 1042–1043 (9th Cir. 1987); see *Garcia-Ramos* v. *INS*, 775 F.2d 1370, 1374 (9th Cir. 1985). In this case, the BIA found no objective basis for petitioner's fear, Pet. App. C14–C17, and hence did not address the "subjective component" of the "well-founded fear" test. "As a general rule

courts and agencies are not required to make findings on issues the decision of which is unnecessary to the results they reach." *INS* v. *Bagamasbad*, 429 U.S. 24, 25 (1976).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

KENNETH W. STARR
Solicitor General
STUART M. GERSON
Assistant Attorney General
DAVID J. KLINE
LORI L. SCIALABBA
Attorneys

MAY 1991

U.S. GOVERNMENT PRINTING OFFICE: 1991—282 061/20574